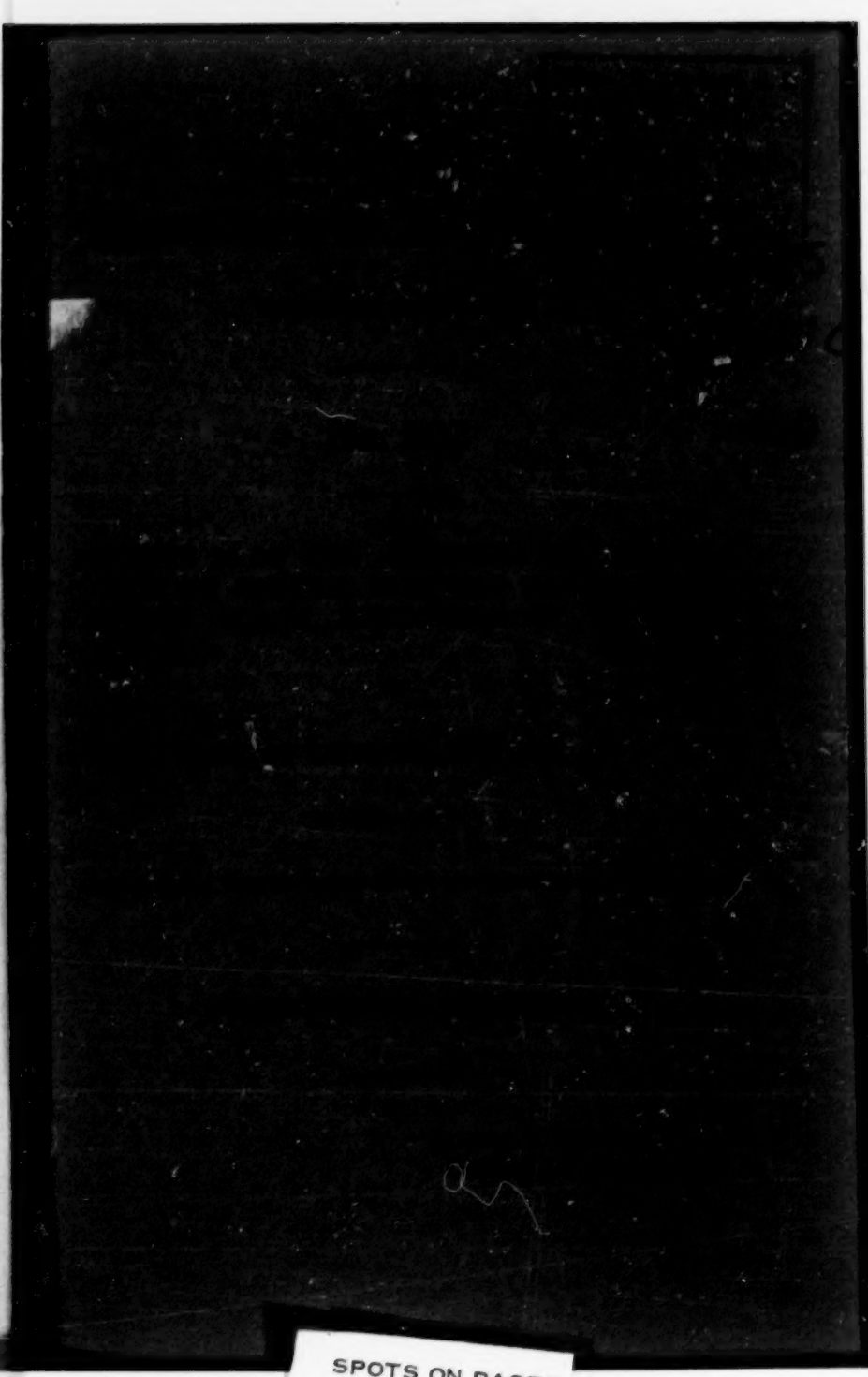
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA; PATRICK McINTYRE, INDIVIDUALLY AND AS PRESIDENT OF SAID DIVISION 26; ROBERT HOLLOWAY, INDIVIDUALLY AND AS VICE-PRESIDENT OF SAID DIVISION 26; WALTER STANLEY, INDIVIDUALLY AND AS BUSINESS AGENT OF SAID DIVISION 26; JOHN FRANCIS, INDIVIDUALLY AND AS SECRETARY-TREASURER OF SAID DIVISION 26; IVOR E. MULLINS, INDIVIDUALLY AND AS SERGEANT-AT-ARMS OF SAID DIVISION 26; GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, INDIVIDUALLY AND AS BOARD MEMBERS OF SAID DIVISION 26,

Appellants,

vs.

CITY OF DETROIT, A MUNICIPAL CORPORATION, BY AND THROUGH FRED P. SISSON, RODNEY BAXTER AND HERMAN L. MOEKLE, AS AND CONSTITUTING THE BOARD OF STREET RAILWAY COMMISSIONERS OF THE CITY OF DETROIT,

AND

UNITED D. S. R. EMPLOYEES LOCAL 312, C. I. O., AFFILIATED WITH GOVERNMENT CIVIC EMPLOYEES ORGANIZING COMMITTEE, C. I. O., AN UNINCORPORATED VOLUNTARY ASSOCIATION, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., AN UNINCORPORATED VOLUNTARY ASSOCIATION

JURISDICTIONAL STATEMENT

Jurisdictional Statement

For Jurisdictional Statement, pursuant to Rule 12(1) of the Rules of this court, as amended, defendants-appellants say:

Opinions Below

The opinion of the Supreme Court of Michigan was rendered January 7, 1952, and is to be found in 332 Mich. 237. Appendix A attached hereto is a copy thereof.

In the trial court this cause was tried contemporaneously with a similar proceeding brought by a citizen and taxpayer, one Avern Cohen. The trial court rendered separate opinions in each case and both opinions are appended hereto, because the opinion in this case refers to and partially incorporates the other.

The Opinion in the Cohen case (R. 468-472) is Appendix B attached hereto, and the Opinion in this case (R. 461-467) is Appendix C.

The Cohen case was appealed to the Michigan Supreme Court and has not been there brought on for hearing. It does not figure in this appeal.

Jurisdiction

The cause is one wherein is drawn in question the validity of a statute of the State of Michigan on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity. Jurisdiction is claimed under Act June 25, 1948, c-646, 62 Sta. 929, Title 28 U. S. C. 1257(2).

The Decree of the Supreme Court of Michigan was entered March 14, 1952, and petition for appeal presented

to the Chief Justice of that Court on May 22nd, 1952, and consideration thereof declined. See order of that court accompanying. It is therefore presented to a Justice of this Court, May 27th, 1952. Timeliness is claimed under Act June 25, 1948, c. 646, 62 Sta. 961, Amended May 24, 1949, c. 139, Sec. 106, 63 Sta. 104, Title 28 U. S. C. 2101(c) which allows 90 days after entry of the decree.

State Statute Involved

The "Hutchinson Act," Act 336, P. A. Michigan 1947, Michigan Compiled Laws 1948, Sec. 423.201 et seq., M. S. A. 17.455(1) et seq., prohibits strikes by public employees as defined in the Act, and imposes "disciplinary action" and "penalties" for striking. Appendix D hereto attached is a copy thereof, and it appears in the Record, p. 456, et seq.

The Title and pertinent sections thereof are as follows:

> "An act to prohibit strikes by certain public employees to provide certain disciplinary action with respect thereto; to provide for the mediation of grievances, and to prescribe penalties for the violation of the provisions of this act.
>
> The People of the State of Michigan enact:
>
> • • • • • • •
>
> "Sec. 2. No person holding a position by appointment or employment in the government of the State of Michigan, or in the government of any one or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee' shall strike."
>
> • • • • • • • •
>
> "Sec. 4. Notwithstanding any other provision of law, any public employee who violates the provisions of this Act shall thereby abandon and terminate his appointment or employment and shall no longer hold such

position, or be entitled to any of the rights or emoluments thereof, including pension or retirement rights or benefits, except if appointed or reappointed as hereinafter provided."

* * * * * * *

"Sec. 5. Notwithstanding any other provision of law, a person knowingly violating the provisions of this Act may subsequent to such violation be appointed or reappointed, employed or re-employed, as a public employee, but only upon the following conditions:

(a) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;

(b) The compensation of such person shall not be increased until after the expiration of 1 year from such appointment or reappointment, employment or reemployment; and

(c) Such person shall be on probation for a period of two years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body.

"Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties shall be deemed to be on strike; *Provided, however*, That such person, upon request, shall be entitled, as hereinafter provided, to establish that he did not violate the provisions of this Act. Such request must be filed in writing, with the officer or body having power to remove such employee, within 10 days after regular compensation of such employee has ceased. In the event of such request such officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this Act have been violated

by such public employee, in accordance with the law and regulations appropriate to a proceeding to remove such public employee. Such proceedings shall be undertaken without unnecessary delay. The decision of such proceeding shall be made within 10 days. In the event that the employee involved is held to have violated this law and his employment terminated he shall have the right to review by way of petition to the Labor Mediation Board, as provided for in Section 7 of this Act.

"Sec. 7. Upon the request of a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board, or upon request of any public official in charge of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievances set forth in said petition or notice, and for the purposes of mediating such grievances, the labor mediation board shall exercise the powers and authority conferred upon said Board by Sections 10 and 11 of Act No. 176 of the Public Acts of 1939."

Questions Presented

We claim that a basic vice of the Hutchinson Act is that it imposes the "disciplinary action" and "penalties" without judicial hearing. It operates directly upon public employees, and by striking they "thereby" incur penalties. By "judicial hearing" we do not mean necessarily a hearing in any established court, but use the term as comprising a hearing of judicial nature (a) before any *impartial tribunal*, (b) that has power to *hear* and (c) to *determine* the controversy.

In our assignments of error in this court, briefly stated, we claim:

(1) The Act is repugnant to the due process of law clause of the 14th Amendment of the Constitution of the United States;

(2) It is repugnant to the equal protection of the laws clause of the same amendment;

(3) It is a Bill of Attainder in violation of Art. I, Section 10, United States Constitution.

Controversy

1. Background: The City of Detroit owns and operates a public transportation system, and its supervision and direction is vested in a Commission of three, appointed by the Mayor of the City, and whose acts are subject to his supervision (R. 3-4). This Commission and the individual members, and the City are the plaintiffs-appellees.

The Commission employs its own bus and streetcar operators, some 3800 in number (R. 72). They are under the Civil Service provisions of the City Charter (R. 463). These comprise defendants-appellants' Union, and the individual defendants-appellants are officers and executive board members of the Union (R. 2-3).

For many years the city and the Union had annually negotiated a contract governing wages, hours and conditions of labor (R. 73-74). These contracts have run generally from April 1st to March 31st, and customarily negotiations for a new contract began before the prior one expired (R. 139). (Three of these annual contracts are exhibits in the record, bound between pages 386 and 387, as Exhibits B-1, B-2 and B-3, covering the period between April 1st, 1948, to March 31st, 1951). Under a provision in the contract allowing opening of the matter during its life, the Union officials approached the Mayor in February 1950 to negotiate for an increase in wages, but were persuaded to delay (R. 131, 139). Negotiations did take place in October or November 1950, however resulting in an hourly increase of 7½ cents and some additional sick benefits (R. 135, 136).

During these negotiations, a strike vote was taken by the Union membership. The City attorneys were discovered in the act of applying for an ex parte injunction and were frustrated when counsel for the Union was notified (R. 136, 208).

By letter dated March 5, 1951, the Union asked for negotiations to commence for a new contract (R. 229-30, 237). A negotiating committee on behalf of the city was set up and negotiations began (R. 142, 162, 261, 262, 336, 348). The union demanded an hourly increase of 15¢ (R. 139, 140, 141, 311 and 312), which was later lowered to 8½ cents hourly (R. 279-280, 312, 313, 359). The Mayor stood throughout on a proposition of five cents hourly increase if the Union would give up certain fringe benefits (R. 143, 177, 315, 320, 353), which the Union would not accept, claiming the fringe benefits had all been obtained by trading something of value and such was no increase at all (R. 210, 276, 292, 293, 310, 315, 317, 320).

As the negotiations continued, the State mediation officials offered their services (R. 167-168) as did a Federal Conciliator unofficially (R. 156). Both were rejected by the Mayor (R. 154, 155, 173, 190, 356, 357), though the Union was willing to mediate (R. 170, 174, 186, 190). Agreement could not be had as to arbitration (R. 343), and on April 17, 1951, the Union voted against arbitration and reposed authority in their Executive Board to call a strike (R. 74, 138, 160, 161, 325-326, 343, 354).

However the mediators obtained consent of the parties to attend a meeting arranged for 7:30 P. M. April 20, 1951 (R. 175, 294, 323). Shortly before the appointed time, a representative of the city notified the mediators that they would not attend, lacking authority (R. 156, 175, 190, 231, 295, 323). The Executive Board fearing another ex parte injunction (R. 208), called a strike, which began the next day, April 21, 1951, at 4:00 A. M. (R. 323). Negotiations

continued after the strike started but the men would not return to work under the penalties of the Hutchinson Act (R. 196, 267, 271, 298, 318).

The Union claimed that the Mayor and other officials had repeatedly threatened application of the Hutchinson Act during negotiations (R. 138, 143, 152, 154, 157, 181, 194, 265, 266, 357), though the Mayor testified that he did not mention the Act until after the strike had started (R. 353). The Union had received legal advice that the Act is unconstitutional before the strike.

The strike continued for 59 days, until after trial of this litigation, started by the city and the Commission. When the trial court rendered its opinion June 12, 1951, (R. 461-472), it held that the city had stopped the steps leading to mediation and therefore should give to the employees an opportunity to return to work "as of the time when negotiations were broken off" (R. 467). Officers of the Union publicly announced that they were willing to comply therewith, and on June 18, 1951, the Union adopted a resolution "that the members of Division 26, return to work under Judge Ira W. Jayne's Opinion (R. 431-432).

2. Proceedings in the Trial Court: While the strike was in progress a bill of complaint was filed in the Third Judicial Circuit of Michigan by the City and the Commission as plaintiffs May 18, 1951 (R. 2-19), praying for injunctive relief (R. 17-18), and for a declaration of rights as follows (R. 18):

> "5. That this court determine and decree that Act 336 of the Public Acts of 1947, commonly known as the Hutchinson Act, is valid and constitutional and that the same is applicable to the Department of Street Railways."

The bill was planked upon the Hutchinson Act, which it quotes and refers to in considerable detail in paragraphs XI to XV inclusive (R, 7-10).

Defendants, these appellants, filed answer June 1, 1951, (R. 21-42) and one paragraph was amended June 5, 1951 (R. 55-61). The answer as amended sets up that the failure of the transportation system to operate at a profit is due to mismanagement, that the Hutchinson Act does not apply to its employees since they did not come under its definition of "public employees", they not being engaged in a governmental activity but rather in a proprietary enterprise. The answer alleged in paragraph XV (R. 33-34):

> "These defendants further say that the said Hutchinson Act is void, and is no law whatsoever because it violates constitutional provisions as follows:
>
> (a) By depriving defendants, and members of Division 26, of the right to contract, violates the due process of law clauses of the Constitution of the United States, and of the Constitution of the State of Michigan, being the 14th Amendment to the Constitution of the United States, and Article II, Section 16 of the Constitution of the State of Michigan.
>
> (b) It violates the due process of law clauses of the 14th Amendment to the Constitution of the United States, and of Article II, Section 16 of the Constitution of the State of Michigan, by depriving the defendants of their property, being pension rights, seniority rights, and of their jobs without due process of law.
>
> (c) It impairs the obligations of a contract, contrary to Article I, Section 10, of the Constitution of the United States of America, and contrary to Article II, Section 9 of the Constitution of the State of Michigan.
>
> (d) Said Hutchinson Act is void because it is a bill of attainder, because it imposes penalties upon these defendants without any judicial hearing, contrary to Article II, Section 9 of the Constitution of the State of Michigan, and contrary to Article I, Section 10 of the Constitution of the United States.
>
> (e) Said Hutchinson Act is void because it denies the equal protection of the laws to these defendants,

contrary to the provisions of the 14th Amendment to the Constitution of the United States, and contrary to Article II, Section 1 of the Constitution of the State of Michigan."

Attached to the answer was a motion to dismiss the bill of complaint (R. 42) which was amended June 5, 1951, the amended motion being based on the following grounds (R. 62):

"1. That the bill of complaint alleges no equity.

2. That the Hutchinson Act upon which the said bill of complaint is planked, is void under the Constitution of the United States and the Constitution of the State of Michigan, for the reasons more specificially set forth in the defendants' answer.

3. That the Hutchinson Act is inapplicable to these defendants based upon the facts more specifically set forth in the above answer.

4. The Hutchinson Act is inapplicable to defendants for they are not public employees.

5. That the bill prays for relief with reference to the restraint of picketing and striking, which is contrary to the constitutional rights of these defendants.

6. The Hutchinson Act contains its own penalties and remedies, which are exclusive, over which this court has no equity jurisdiction."

Defendant-appellants also filed with the answer a cross-bill of complaint based upon the same claims of unconstitutionality praying injunctive relief against application of the act (R. 44-47).

The motion to dismiss was argued during the course of the trial at the close of plaintiff's case (R. 98-103) and taken under advisement by the court. It was denied in the decree (R. 473) and the cross-bill of complaint dismissed.

Two other local unions petitioned and were granted leave to intervene in this case (R. 48-54) and participated in the proceedings through the Michigan Supreme Court. They

will be served with notice of proceedings in this court as appellees, though we are informed by their counsel that they do not intend to participate in this appeal.

Trial was had before the Honorable Ira W. Jayne, one of the Judges of the Circuit Court for the County of Wayne (Third Judicial Circuit) In Chancery, from June 5, 1951 to June 11, 1951. The court filed its opinion June 12, 1951, holding therein against defendants, these appellants, on all contentions as to unconstitutionality of the Hutchinson Act. The trial court said in part (R. 461-462):

> "The controversy between the parties revolves around Act No. 336 of the Public Acts of 1947, commonly called the Hutchinson Act.
>
> The first question raised by the defendant challenges the constitutionality of the Act. We have recently held the Act constitutional in
>
> Avern L. Cohen v. City of Detroit, et al.,
> Chancery No. 475-156
>
> The findings there, we shall adopt here (See attached opinion). The Act is constitutional."

A copy of the trial court's decree is Appendix E.

3. Proceedings in Michigan Supreme Court: Claim of general appeal to the Supreme Court of Michigan was filed by the City and Commission June 26, 1951, (R. 475-476), and of general cross-appeal by the defendants, these appellants June 28, 1951 (R. 478).

Cross-appellants below, these appellants, as assignments of error in the appeal to the Michigan Supreme Court (called "Reasons & Grounds of Appeal" under Michigan practice) claimed as follows (R. 487-489)

> "1. The court erred in denying these cross-appellants' motion as amended, to dismiss plaintiffs' bill of complaint, for the reasons set forth in said motion.
>
> 2. The court erred in holding that Act 336 P. A. 1947 is constitutional.

3. The court erred in holding that Act 336 P. A. 1947 applies to the Department of Street Railways of the city of Detroit and its employees.

4. The court erred in refusing to hold that Act 336 P. A. 1947, violates Article II, Section 16 of the Constitution of the State of Michigan and the 14th Amendment to the Constitution of the United States by depriving cross-appellants of the right to contract without due process of law.

5. The court erred in refusing to hold that Act 336 P. A. 1947, violates Article II, Section 16 of the Constitution of the State of Michigan, and the 14th Amendment to the Constitution of the United States by depriving cross-appellants of property without due process of law.

6. The court erred in refusing to find that Act 336 P. A. 1947, violates Article 1, Section 10 of the Constitution of the United States and Article II, Section 9, of the Constitution of the State of Michigan, by impairing the obligations of contract.

7. The court erred in refusing to hold that Act 336 P. A. 1947, is a bill of attainder, in violation of Article II, Section 9 of the Constitution of the State of Michigan, and Article I, Section 10 of the Constitution of the United States, because it imposes penalties without judicial hearing.

8. The Court erred in refusing to hold that Act 336, P. A. 1947, violates Article I, Section 1 of the Constitution of the State of Michigan, and the Fourteenth Amendment to the Constitution of the United States, by denying equal protection of the laws.

9. The court erred in holding that cross-appellants were public employees as defined in Act 336 P. A. 1947.

10. The court erred in holding that Act 336 P. A. 1947, prevails over the Civil Service provisions of the Charter of the City of Detroit.

11. The court erred in holding that Act 336 P. A. 1947, was applicable to the Department of Street Railways of the City of Detroit, and its employees, despite the Civil Service provisions of the Charter of said City.

12. The Court erred in holding that cross-appellants are public employees."

These assignments of error were argued in briefs in the Michigan Supreme Court and also on oral argument on Oct. 5, 1951.

The Michigan Supreme Court denied all the claims of unconstitutionality, saying in its opinion, pages 252-253:

> "In view of the foregoing and, also, in accord with authorities hereinafter noted, it cannot be held, as defendants and cross-appellants contend, that by the Hutchinson Act the striking employees of Detroit's Street Railway system are subjected to a statute which violates the United States Constitution (Art. 1, Sec. 10) and the State Constitution (1908) (Art. 2, Sec. 9) prohibiting passage of bills of attainder; nor that they are deprived of rights without due process of law (United States Constitution, Fifth Amendment; State Constitution (1908) Article 2, Sec. 16,) nor of equal protection of the laws (United States Constitution, Fourteenth Amendment; State Constitution (1908) Art. 2, Sec. 1). Nor are we in accord with Cross-appellants' contention that this act impairs contractual rights possessed by employees of Detroit's Street Railway system, in violation of constitutional provisions (United States Constitution, Art. 1, Sec. 10, State Constitution (1908) Art. 2, Sec. 9). The Hutchinson Act cannot be held unconstitutional on any of the grounds just above noted."

The decree of that court provides in part:

> "It is ordered, adjudged and decreed, and this court doth hereby Order, Adjudge and Decree that Act 336 of the Public Acts of 1947, commonly known as the Hutchinson Act, is a constitutional law of this state and does not violate the United States Constitution (Article I, Section 9) and the Michigan State Constitution (Article II, Section 9,) prohibiting the passage of bills of attainder; nor the United States Constitution, Fifth Amendment and the State Constitution (Article II,

Section 16), forbidding the deprivation of rights without due process of law; nor the United States Constitution, Fourteenth Amendment, and the State Constitution (Article II, Section 1), requiring the equal protection of the laws; nor the United States Constitution (Article I, Section 10), and the State Constitution (Article II, Section 9,) forbidding the impairment of contractual rights, nor the State Constitution (Article VIII, Sections 21 to 23 inclusive), being the grant of local self-government to home rule cities."

An application for rehearing on behalf of these appellants was filed February 14, 1952 and was denied March 6, 1952 prior to entry of decree,

A copy of the Decree of the Michigan Supreme Court is attached as Appendix F.

4. We think it requires no further demonstration that the issues raised in this appeal were squarely presented in trial court and in the Michigan Supreme Court, and further that both of those courts passed directly upon them, and that it was necessary that they do so in order to reach the decision they did reach, for that court made declarations of right under the statute, and affirmed the decree of the lower court in dismissal of the cross-bill and denial of the motion to dismiss.

We shall devote little effort to show that where a statute is challenged under the Federal Constitution, a federal question is presented, and this court has jurisdiction in that respect. *Senn* v. *Tile Layers Protective Union,* 57 Sup. Ct. 857, 301 U. S. 468 (476-477) 81 Law Ed. 1229; *Tregea* v. *Board of Directors of Irrigation District,* 17 Sup. Ct. 52, 164 U. S. 179 (185) 41 Law Ed. 395.

Nor do we think there is any question that the Supreme Court of Michigan is the highest court of the State in which decision can be had. A motion for rehearing was made and denied prior to entry of decree. There can be

no further review in any state court, for under the Michigan Constitution all other courts are "inferior to the Supreme Court". Mich. Const. Art. VII, Sec. 1. It has "general supervisory control over all inferior courts." Mich. Const. Art. VII, Sec. 2. See *Smith* v. *Wayne Circuit Judge,* 64 Mich. 479. Its jurisdiction being fixed by the Constitution, it cannot be either increased or diminished by the Legislature. Application of Consolidated Safe Company 265 Mich. 345. It has "Power to review in some way all final judgments". *Schwab* v. *Coots,* 44 Mich. 463 (465).

The decision of the Michigan Supreme Court was more than a declaratory judgment, for it dismissed appellants' cross-bill of complaint and affirmed the lower court in denying their motion to dismiss, in both of which the constitutional questions here urged were directly presented. It finally decided issues and rights of the parties as presented by all parties. But had it been merely declaratory under the state statute relative to declaratory judgments, it would still possess the element of finality, for that Act applies only to "cases of actual controversy". Act 36, Michigan P. A. 1929; *Theatre Co.* v. *Moore,* 249 Mich. 673. And see: *Nashville & St. L. R. Co.* v. *Wallace,* 288 U. S. 249; 53 Sup. Ct. 345. 77 Law Ed. 730; *Railway Mail Assoc.* v. *Corsi,* 326 U. S. 88, 65 Sup. Ct. 1483, 89 Law Ed. 2072, holding that such decrees are final adjudications.

The Decree appealed from was entered in the Supreme Court of Michigan, and it leaves nothing for the lower court to do.

We think the issues were properly presented below, and that an appealable decree is presented.

Substantial Questions

1. The Hutchinson Act is more than merely regulatory of municipal activities. It is *punitive* as to the employees.

Though the Michigan Supreme Court avoids the terms in its opinion, and spoke of "limitations and regulations", the Act itself, in its title, speaks of "disciplinary action" and "penalties".

Obviously, the Act (Sec. 2) not only prohibits strikes, but by its own force goes a long way beyond. *It imposes penalties upon the employees for striking.* This is legislative exercise of judicial functions.

Under Section 4, if an employee strikes he *ipso-facto* loses his job, emoluments thereof (wages) and pension and retirement rights, unless reappointed under Sec. 5. But if he is reappointed under Section 5, *he cannot escape penalties*, for his wages can be no higher than when he struck, cannot be increased for a year, and he must be on probation for two years without tenure "at the pleasure of the appointing officer or body."

It is important that the discharge of the employees and imposition of penalties under this Statute are not the act of the employing municipality at all. They are brought about solely by the Statute itself. There is an absolute job severance and application of penalties "notwithstanding any other provision of law". By striking, the employee "thereby" loses his job and incurs the other penalties. The statute operates directly on the employees and does not merely make striking grounds for discharge, but makes it mandatory that the employer treat the employee as discharged, and unable to rehire him except subject to penalties.

We shall not assert the claim that the State Legislature may not provide penalties as to municipal employees for acts deemed inimical to public good, *but we do assert that the penalties may not be imposed by the Legislature without judicial hearing.* By applying penalties directly the Legislature transcends the legislative field.

To do so is arbitrary, and contrary to due process of law. "There are many cases which hold that removals for cause are acts of a judicial nature". *Fuller* v. *Attorney General*, 98 Mich. 95, 104.

2. *A basic vice of the Hutchinson Act is that it imposes penalties without judicial hearing.* The penalties are imposed for "wilful" striking. Sec. 6.

The act itself provides for two remedies for the employee, neither judicial in nature.

(A) Section 6 provides that the employee may apply to his employer to establish "that he did not violate the provisions of the Act," i.e., did not "wilfully" strike.

Any such hearing is not a judicial hearing for it *lacks the element of an impartial tribunal.* The employer is the opposing party in the controversy. "A familiar rule of law is that no man may be a judge in his own case." *Zimmer* v. *Supervisors*, 159 Mich. 213 (219). "We recognize that the rule of due process of law requires that the hearing which is a quasi judicial proceeding conducted by administrative officers, be before a fair and impartial tribunal." In Re: *Doyle's Application*, 312 Mich. 205 (210-211). See also: *Ames* v. *Booming Company*, 11 Mich. 139; *Milk Marketing Board* v. *Johnson*, 95 Mich. 644. Doubtless such hearing before the employer would be sufficient if the question were one of discharge by the employer. But we refuse to believe that the act is sufficient to clothe the employer with the judicial power of hearing and determining whether a penal statute has been violated.

(B) Section 7 of the Act provides for *mediation* under certain sections of the State Mediation Act—Act 176, Mich. P.A. 1939. This may be invoked under the Hutchinson Act (Sec. 7), "upon the request of a majority of any given group of employees evidenced by a petition signed by said majority," and the employer may also invoke it. The Union

is ignored—it cannot apply for mediation. The individual employee has no recourse at all under this provision, for the petition must be signed by a majority. Over and above this, *the process of mediation does not result in a determination.* The State Mediation Board can only "effect a voluntary, amicable and expeditious adjustment and settlement." Act 176 Mich., P. A. 1939. This is certainly not a judicial hearing, for the mediation board has no power to determine.

(C) All other hearings are excluded by the Act. Sec. 4 provides that, "Notwithstanding any other provision of law, any public employee who violates the provisions of this Act shall *thereby* terminate his appointment or employment". Under Sec. 6, "Notwithstanding the provisions of any other law," he shall be deemed on strike. So no additional hearing is possible. Civil Service hearings and all other hearings are excluded. And Civil Service hearings apply only to discharges by Department heads, not discharges brought about by the Legislature. *Goodfellow* v. *City of Detroit*, 312 Mich. 226.

The Supreme Court of Michigan did not hold that Civil Service hearings might be invoked, nor has it ever been so claimed by anyone. In addition, Civil Service, under the Detroit City Charter, provides for no hearing on the issues presented under the Hutchinson Act. See *Goodfellow* v. *Detroit* (*Supra*).

It is important too that these employees are subject to and enjoy Civil Service. They may be removed only for cause, and are but for the Hutchinson Act, entitled to a hearing before the Civil Service Commission to review their discharge, and it will be invalidated if for any reason other than the good of the service or if for religious or political reasons. *Goodfellow* v. *Detroit Civil Service Commission*, 312 Mich. 226, Charter Title IV, Ch. II, Section 18 (R. 463, 72).

The Hutchinson Act, since it operates to sever an employee from his job and to impose other penalties, is penal in nature. *Attorney General* v. *Bairley*, 209 Mich. 120, *Dullam* v. *Willson*, 53 Mich. 416; *Metevier* v. *Therrien*, 80 Mich. 187, *Huntington* v. *Attrill*, 146 U. S. 657, 13 S. Ct. 224, 36 L. Ed. 1123. It cannot be applied "without due process of law; 'and this requires notice to the party, a hearing, and determination' " *Metevier* v. *Therrien*, 80 Mich. 187 (190).

And in addition to the penalties above mentioned, the *Hutchinson Act interferes with the employees' right to contract.* If, after a strike, the employees are reappointed under Sec. 5 (as they were deemed to be in this case) they may not have an increase in wages for a period of a year. Obviously their right to contract—to bargain for and sell their services for such price as they can get, is curtailed to that extent. But under the Hutchinson Act, after striking, the employee cannot bargain with his employer, or contract as to wages, hours, increase or conditions of labor.

The Michigan Supreme Court held that this was no constraint of any kind on the employees, but only on the municipality. To us this seems grasping at the shadow instead of the substance. If the City cannot bargain and contract with its employees, neither can the employees bargain and contract with the city.

The right to contract is protected by the due process of law clause. *Algeyer* v. *La.* 165 U. S. 578, 17 Sup. Ct. 472; 41 L. Ed. 832 (835-836); *Estate of Meredith*, 275 Mich. 278 (290); *Kuhn* v. *Common Council*, 70 Mich. 534.

The right to work, to pursue any ordinary occupation and to earn a living are rights protected by the applicable constitutional provision as liberty and property. *Butchers Union etc.* v. *Crescent City etc.* 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585; *People* v. *Victor*, 287 Mich. 506, *Caroline Products Co.* v. *Thompson*, 276 Mich. 172.

We have read the more recent decisions of this court relative to "right to work" and "closed shop", and upholding legislative power to fix prices, wages and hours. But we think the law is yet clearly that due process of law protects the right to contract—the right of the worker to bargain and sell his labor in an unfettered market, and is also a barrier to legislative judgments inflicting penalties.

> "Creating a right or conferring it on one when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers, *and the consequences of a breach of duty, including punishment and removal,* are all political regulations, and fall *within the legislative province. But to inflict those punishments, after finding the default, is to adjudge,* and to do it without default is equally so, and still more, indefensible.
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> * * * * * * *
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> "*In reference to the infliction of punishment* and divesting of the rights of property, it has been repeatedly held in this state, and it is believed in every other of the union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that *such legislative acts as profess in themselves directly to punish persons,* or to deprive the citizen of his property, *without trial before the judicial tribunals* and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, *are not effectually 'law of the land', for those purposes.*"
>
> *Hoke* v. *Henderson,* 15 N. C. 1, 25.

"But it is not to be supposed that these legislative powers are so absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every Act, legislative in form, that is law. Law is something more than mere will exerted as an act of

power. It must be not a special rule for a particular person or a particular case, but in the language of Mr. Webster in his familiar definition, '*The general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.*' So that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society, 'and thus *excluding* as not due process of law, Acts of confiscation, Acts reversing judgments and acts directly transferring one man's estate to another, legislative *judgments and decrees and other similar special, partial and arbitrary exertions of power under the forms of legislation.* Arbitrary power enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.''

Hurtado v. *People of California,* 110 U. S. 516, 535, 536, 4 S. Ct. 111, 28 L. Ed. 232.

Authorities could be vastly multiplied. The *principle* is elementary. "No such arbitrary power can exist where the principles involved in due process of law are recognized. *Yamataya* v. *Fisher,* 189 U. S. 86, 101, 23 S. Ct. 611, 47 L. Ed. 721.

We think that the Hutchinson Act violates the due process of law clauses of the 14th Amendment under most elementary principles by imposing penalties and restricting the rights of contract without hearing of any judicial nature. The Statute operates as a legislative judgment or decree.

3. We think the Hutchinson Act is repugnant to the equal protection of the laws clause of the Fourteenth Amendment.

Fundamentally, as the Hutchinson Act is applied in this case at least, it is the employees who are classified. It is not the enterprise. Those persons who are employed by municipally owned public utilities are carved out of the larger class of all public utility employees, and made subject to the Act while the larger class is excluded.

In order to make this sub-classification a reasonable basis must be found. We think no reasonable basis exists, whereby equal protection of the laws is denied.

The Michigan Supreme Court found a basis in "the necessity to administer public affairs", and to administer "efficient government."

But the operation of the street railway system of Detroit is no part of the municipal government. There is no relation at all between the operation of the system and the municipal government. In operating a public transportation system, the city is not governing its people. We must distinguish between "public" affairs and "governmental" affairs. (In perusal of a considerable number of authorities, we are impressed that lack of clear use of terms tends to confuse the issue; or perhaps evidences confusion about the issue.) Any public utility is a "public" affair, but mere municipal ownership does not make it "governmental". In engaging in the operation of this street railway system, the city of Detroit is engaging in business, not in government. When a governmental agency does this, "it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and in the business which is to be transacted." *Bank of the United States* v. *Planters Bank of Georgia*, 9 Wheat 904, 907, 6 L. Ed. 244.

That the City of Detroit in operating the public transportation system is engaged in a proprietary enterprise, a business, as distinguished from government, admits of no doubt. The Supreme Court of Michigan does not specifically discuss the point, though we think it is tacitly admitted in the opinion. But the City Corporation Counsel

has advised the Department of Street Railways July 15, 1940 (R. 441):

> *"The business of the Department of Street Railways is not a governmental function but is purely a proprietary function of the City of Detroit,* its operating expenses are not maintained in any respect by general taxation, but as provided in the Charter it derives its sole income from the revenues of the system. *In the inquiry at hand, the governmental powers of the City by which it regulates and controls its inhabitants in a sovereign capacity is not involved, and the question relates only to the proprietary or business powers of the city.* This power of the Department of Street Railways is fully recognized in the Charter provisions wherein it is stated that *the business of transportation shall be conducted by the Board as fully and completely as if said Board represented private owners."*

Fire Departments and Police Departments of municipalities cited as illustrative by the Michigan Supreme Court, are not illustrative at all. Fire departments (*Powell* v. *Village of Fenton,* 240 Mich. 94) and Police departments (*Fraternal Order of Police* v. *Lansing Board of Commissioners,* 306 Mich. 68, 76-78) have been held by that court to be strictly governmental agencies. That an act of the Legislature might be constitutionally applied to employees of those departments, does not necessarily mean that it may be applied to a department of street railways, nor of any other proprietary activity of a municipality.

The Supreme Court of Michigan has very many times held under various circumstances, that in conducting a business enterprise a municipality is "governed by the same rules which control a private individual or business corporations under like circumstances." *Andrews* v. *City of South Haven,* 187 Mich. 294, 298. See *Borski* v. *Village of Wakefield,* 239 Mich. 656; *Sykes* v. *Village of Portland,* 177 Mich. 290; *Hodgens* v. *Bay City,* 156 Mich. 687; *Watson* v. *Bay City School District,* 324 Mich. 1; *Taylor* v. *Road Com-*

missioners, 297 Mich. 487. "Otherwise, it would be granting to one class engaged in private business privileges or immunities not possessed by others 'under like circumstances' . . . When a city voluntarily goes into the same commercial business as private citizens, there is no good reason why it should be given special privileges not enjoyed by others who are compelled to meet its competition." *Borski* v. *Village of Wakefield,* 239 Mich. 661.

This Court has at least twice held that for income tax purposes an employee of a proprietary agency of a political entity must be governed by the rules applicable to employees of a private enterprise. *Helvering* v. *Powers,* 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291; *S. Carolina* v. *U. S.,* 199 U. S. 437, 50 L. Ed. 261.

We are aware that a considerable number of decisions in which for various purposes—notably for taxation and licensing—the fact of municipal ownership has been held a sufficient basis of classification. But we think, on the weight of authority and sound *principle,* particularly when municipal employees rather than the enterprise in which they are employed are the real subjects of classification, the basis is not a reasonable one.

We can see no distinction between a man employed in operating a bus owned by a city, and a bus owned by a private enterprise. He certainly is not engaged in governing the people.

We think the Hutchinson Act denies these appellants the equal protection of the laws.

(4) *We think the act is also a Bill of Attainder* proscribed by the Constitution, Article I, Section 10. This constitutional provision stands, "for the proposition that legislative acts, no matter what their form, that apply to named individuals or to easily ascertained members of a group, in such a way as to inflict punishment on them without a judicial trial are Bills of Attainder prohibited by

the Constitution." *U. S.* v. *Lovett,* 328 U. S. 303, 90 L. Ed. 1252, 1259. See also: *Cummings* v. *Missouri,* 4 Wall. 277, 18 L. Ed. 356; Ex Parte Garland, 4 Wall. 333, 18 L. Ed. 366; *Pierce V. Carskadon,* 16 Wall. 234, 21 L. Ed. 276; In Re Shorter, Fed. Cas. No. 8126; Murphy N. D. Test Oath cases, 41 Mo. 339; *State* v. *Heighland,* 41 Mo. 388; *Green* v. *Shumway,* 39 N. Y. 418; In re Young Sing Hee, 13 Sawy. 482, 36 Fed. 437; *Burkett* v. *McCarthy,* 10 Beach (Ky.) 758; *Haines* v. *Bufford,* 1 Dana (Ky.) 481; *McNeely* v. *Gregory,* 13 Fla. 417; *David* v. *Beery,* 216 Fed. 413 (reversed on other grounds, 242 U. S. 468, 61 L. Ed. 441). On this point the Supreme Court of Michigan held (332 Mich. 237, 247) that no punishment is inflicted by the Act because "It does not provide for fines or imprisonment" nor deprive the employees "of any vested right."

We do not doubt that the "disciplinary action" and "penalties" as provided in the Act are "punishment." So far as Bills of Attainder are concerned, it has never been required that the punishment amount to "fine or imprisonment" or deprivation of any "vested right."

In *U. S.* v. *Lovett, supra,* Justice Frankfurter, concurring in result but expressing the opinion that the Act of Congress there involved was not a bill of attainder, said: "The amount of punishment is immaterial to the classification of a challenged statute." Justice Frankfurter held that "punishment" must have as a prerequisite an act to be punished. This requirement is fulfilled by the Hutchinson Act.

We think *Cummings* v. *Missouri, supra,* is correct in stating 4 Wall. 277, 320; 18 Law Ed. 356:

> *"We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.'* The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law. He

does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determining this fact. Disqualifications from office may be punishment, as in cases of conviction upon impeachment. *Disqualification from the pursuits of a lawful avocation, or from positions* of trust or from the privilege of appearing in the courts or acting as executor, administrator or guardian may also, and often has been imposed as punishment."

* * * * * * *

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the *pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no way otherwise defined.*"

Cummings v. *Missouri*, 18 Law Ed. 362.

American Communications v. *Douds*, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925, cited by the Michigan Supreme Court does not discuss Bills of Attainder. Its comment as to punishment is in accord with our own views above.

Garner v. *Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317, distinguishes itself from the case at bar. That decision dealt with a city charter and ordinance provision requiring city employees to file a non-communist affidavit. This court said (341 U. S. 721-722): "While the amendment deprived no one of employment *with or without trial*, yet from its effective date it terminated any privilege to work for the city in the case of persons who

thereafter engaged in the activity proscribed—*We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.*"

We think the Hutchinson Act is a Bill of Attainder.

(5) We believe substantial questions are raised. Stated at a minimum, we think the federal questions presented require "analysis and exposition," and therefore are substantial. *Milheim* v. *Moffat Tunnel Improvement District*, 262 U. S. 710, 716, 43 S. Ct. 694, 67 L. Ed. 1194. Nor do we think the question so clearly lacking in merit that upon citing any of this court's decisions, "it may be put aside." *Alton R. Co.* v. *Ill. Commerce Commission*, 305 U. S. 548, 550, 59 S. Ct. 340, 83 L. Ed. 344.

No statute similar to the Hutchinson Act has come to our attention save in those several states where practically identical statutes have been adopted. We are not here asserting a right to strike on the part of municipal employees. We are assuming that its prohibition is within the legislative powers of the state. But for the statute to *operate directly* upon the employees, without regard to the desires of their employer, or much less, any decision of an impartial tribunal, and impose "disciplinary action" and "penalties" for striking seems to us arbitrary, and clearly in violation of the constitutional provisions invoked.

We shall not go into statistics as to the number of public employees affected nor as to the number of political units. Several states already having adopted the law, the issues presented in this appeal are manifestly of very wide application.

Respectfully submitted,

EDWARD N. BARNARD,
Attorney for Defendants-Appellants,
Address: 905-11 Dime Building,
Detroit 26, Michigan.

Dated: May 22, 1952.

APPENDIX "A"

OPINION

Michigan Supreme Court—332 Mich. 237

STATE OF MICHIGAN, SUPREME COURT, OCTOBER TERM, 1951

Filed January 7, 1952

CITY OF DETROIT, a municipal corporation, by and through FRED P. SISSON, RODNEY BAXTER and HERMAN L. MOEKIE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiff, Appellant and Cross-Appellee,

vs.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA; PATRICK MCINTYRE, individually and as President of said Division 26; ROBERT HOLLOWAY, individually and as Vice-President of said Division 26; WALTER STANLEY, individually and as Business Agent of said Division 26; JOHN FRANCIS, individually and as Secretary and Treasurer of said Division 26; IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26; GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY MCKESSON, DAVID LATIMER, individually and as Board Members of said Division 26, JOHN DOE and RICHARD ROE, whose persons are well known, but whose names are unknown,

Defendants, Appellees and Cross-Appellants,

and

UNITED DSR EMPLOYEES LOCAL 312 C.I.O., Affiliated with Government Civic Employees Organizing Committee, C.I.O., an unincorporated voluntary association, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., an unincorporated voluntary association,

Intervening Defendants and Appellees.

Before the Entire Bench, Except Butzel, *J.* North, *C.J.*

This litigation was started by a bill in equity filed in the Wayne county circuit court by the city of Detroit acting

through its board of street railway commissioners. Injunctive relief is prayed; also a ruling as to the constitutionality of the so-called Hutchinson Act (PA 1947, No. 336 (CL 1948, Sec. 423.201, et seq.; Stat. Ann Sec. 17.455(1), et seq.));[1] its application to Detroit's transportation sys-

[1] We note the material portions of the Hutchinson Act—PA 1947, No. 336 (CL 1948, Sec. 423.201-423.207; Stat. Ann. Sec. 17.455(1)-17.455(7)):

"An Act to prohibit strikes by certain public employees; to provide certain disciplinary action with respect thereto; to provide for the mediation of grievances; and to prescribe penalties for the violation of the provisions of this act."

Section 1 is the statutory definition of the word "strike".

"Sec. 2. No person holding a position by appointment or employment in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee', shall strike. • • •

"Sec. 4. Notwithstanding any other provision of law, any public employee who violates the provisions of this act shall thereby abandon and terminate his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, including pension or retirement rights or benefits, except if appointed or reappointed as hereinafter provided. • • •

"Sec. 5. Notwithstanding any other provision of law, a person knowingly violating the provisions of this act may subsequent to such violation be appointed or reappointed, employed or re-employed, as a public employee, but only upon the following conditions:

"(a) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;

"(b) The compensation of such person shall not be increased until after the expiration of 1 year from such appointment or reappointment, employment or re-employment; and

"(c) Such person shall be on probation for a period of 2 years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body."

Section 6 provides that the employee, for the purpose of showing he did not violate the provisions of this act, may have a prompt hearing before and a determination by the officer or body having power to discharge the employee and a right of review by the employee before the labor mediation board, as provided for in section 7 of this act.

Section 7 provides for mediation of grievances by the labor mediation board and the powers and duties of that board as provided by sections 10 and 11 of Act No. 176 of the Public Acts of 1939 (CL 1948, Sec. 423.10, 423.11). Sections 10 and 11 of Act No. 176 are not altered by PA 1949, No. 230, which amends PA 1939, No. 176.

tem and the employees therein, and other related controverted issues. Issues were formed by the answer of the above named original defendants and their cross-bill, to which plaintiff answered; and by the answer to plaintiff's bill of complaint filed by United DSR Employees Local 312 C.I.O., one of the above named parties who were permitted to intervene as defendants. The real parties defendants in interest are the employees in Detroit's department of street railway system, owned by the city and operated by its board of street railway commissioners. Following a lengthy pretrial hearing, incident to which there was a stipulation of certain facts, testimony was taken in open court. From the decree entered plaintiff has appealed and the original defendants have cross-appealed.

Throughout the proceedings which culminated in this litigation, the Detroit street railway employees were represented by their bargaining agent, Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America. The pending controversy primarily arose incident to the employees' demand for an increase in base pay. The immediately preceding contract between the city and these employees, by its terms, had expired. Following quite extended negotiations, and on April 17, 1951, the union took a vote of its membership on two questions, the first of which was: "Do you favor a strike?" and the second was: "Do you favor arbitration?" The vote resulted overwhelmingly in favor of the first question, namely to strike. While the foregoing vote is claimed by defendants to have been merely advisory, a strike was called which went into effect April 21, 1951. With minor exceptions, this strike caused complete cessation of the public transportation service theretofore rendered by plaintiff through its street railway department. This condition continued until the employees on June 18, 1951, returned to work under the terms of the circuit judge's opinion which was filed at the conclusion of the trial had in the interim. The decree was filed June 26, 1951.

The trial court decreed the Hutchinson Act constitutional and that it was applicable to "plaintiff and all of its employees." Defendants have appealed from these provisions

in the decree. The issue of constitutionality of the Hutchinson Act, which is challenged by the defendants and cross-appellants, is of primary importance and is first considered herein.

In reaching decision in the instant case it is essential to keep in mind that the provisions of the Hutchinson Act apply only to "public employees." And also that, as hereinafter held, the persons engaged in operating Detroit's street railway system are employees of the city of Detroit and hence are "public employees." The act is designed, as a matter of public policy, to prevent strikes by public employees (Local Union No. 876 *v.* Labor Board, 294 Mich 629) by providing that by striking such an employee "shall thereby abandon and terminate his appointment or employment," and by limiting or restricting the right of the public employer to re-employ a public employee who participated in a strike. It provides for substituting mediation in place of ordinary strike procedure, and that either party, by proper application, may obtain mediation.

A basic reason urged by cross-appellants in challenging the constitutionality of the Hutchinson Act is that it contains no provision for judicial review of rights asserted by a discharged public employee, and hence they are deprived of due process of law. However, by section 6 of the act provision is made for such an employee to have a hearing before the officer or body having power to remove such employee, and for a right of review of a holding adverse to such employee before the labor mediation board. We have held that like provisions are quasi-judicial and afford to the discharged employee compliance with his constitutional rights. In *In re Fredericks*, 285 Mich 262, a headnote reads:

> "A decision of a municipal civil service commission upon a hearing to remove an employee of a fire department for cause, not being the result of judicial action, but being at most a quasi-judicial act of an administrative tribunal, is not subject to review by the courts on appeal and an attempt by the legislature to create a right of appeal would be unconstitutional as an endeavor to foist nonjudicial functions upon the courts."

See also, *Goodfellow* v. *Civil Service Commission*, 312 Mich. 226; Local 170, *T.W.U.* v. *Circuit Judge*, 322 Mich. 332.

Cross-appellants rather strenuously also contend that this statute is unconstitutional since it is in effect a bill of attainder. We cannot so hold. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *United Steel Workers of America* v. *National Labor Relations Board*, 170 F 2d 247, 267, affirmed, 339 U.S. 382. See, also, *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716; 95 L. ed. 1317. The Hutchinson Act provides certain limitations and regulations, but it "inflicts" no punishment. It does not provide for fines or imprisonment, nor does it deprive a public employee, who has taken part in a strike, of any vested right.

We know of no constitutional provision which gives an individual the right to be employed in governmental service or to continue therein. If there is no such right then there is no constitutional inhibition of reasonable restrictions or limitations being applied thereto; and such restrictions or limitations could not be held to be in the nature of bills of attainder. See *Bailey* v. *Richardson*, 182 F. 2d 46, 63, wherein the court said:

> "But it has long been established that if the Government, in the exercise of a governmental power, injures an individual, that individual has no redress. • • •
>
> " 'As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative', and the court (in *Gregoire* v. *Biddle*, 177 F 2d 579) concluded that both upon authority and upon reason the rule laid down should be followed."

There is ample authority to the effect that public employment does not vest in such employees any fixed or permanent rights of employment. As individuals or in groups public employees may discontinue their employment, but, having done so, such public employees have no vested right to insist upon their re-employment on terms or conditions agreeable to the employees, or even without compliance

with such conditions. To hold otherwise would result in public agencies being powerless to render public service and to effectively administer public affairs; and the public would thereby be deprived of its right to efficient government. For example, if the members of a fire department or of a police department collectively refused to continue to serve except upon conditions insisted upon by them, unless their employer supinely yielded, the public, which by taxation pays therefor, would be deprived of fire or of police protection; and the right or power to exercise essential governmental affairs nullified. There seems to be ample reason and authority for holding that the right of public employees to collectively refuse to render the service for which they are employed differs in legal point of view from the right of private employees to strike, and hence the classification of "public employees" for the purpose of applicable legislation is valid.

> "The legislature may make classifications of persons, provided such classifications are based on substantial distinctions, are in accord with the aims sought to be achieved, and are not arbitrary or capricious but rest on reasonable and justifiable foundations." *People* v. *Chapman* (syllabus), 301 Mich. 584.

Among authorities with which we are in accord and which support our decision herein, are the following:

> "The question is whether or not public employees do have the right to strike. Under the common law,—and there is no question about it so far as this court is concerned,—there is no right to strike on behalf of public employees, for many reasons, some of which at least, might be paraphrased in the language of several of the decisions, that it is a means of coercing the delegation of the discretion which a public Board or public Body must exercise in its fulfillment of its duties. * * * (Citing several cases.)
>
> "It has been repeatedly stated that it is against public policy for public employees to strike. Many courts have held that a strike by public employees is against

public policy, is unlawful, illegal and may be restrained and enjoined." *Cleveland* v. *Division* 268, 41 Ohio Opinions 236, 90 NE 2d 711.

We are mindful that the foregoing quotation is from the opinion of a court of inferior jurisdiction, rather than one of last resort; but the holding therein is in accord with decisions rendered by courts of highest judicial authority.

"Congress has the power to regulate, within reasonable limits, the political conduct of federal employees, in order to promote efficiency and integrity in the public service. * * *

"The fundamental human rights guaranteed by the First, Fifth, Ninth and Tenth Amendments are not absolutes; and this Court must balance the extent of the guarantee of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by employees of the Government." United Public Workers v. Mitchell (syllabi), 330 US 75.

The case of Bailey v. Richardson, *supra*, was decided in the United States court of appeals for the District of Columbia. Three United States circuit judges sat in the case one of whom dissented from the prevailing opinion. The decision of the circuit court of appeals was reviewed on certiorari by the supreme court of the United States, and there affirmed by an equally divided court (341 US 918). A detailed opinion was not written by the United States supreme court, and therefore we quote the following from the headnotes of the decision rendered in the circuit court of appeals:

"If a federal government employee has no constitutional right to office, and executive officers have power to dismiss the employee, the fact that dismissal on ground of superiors' belief in employee's disloyalty to the federal government imposes a stigma and seriously impairs employee's future chances of making a living does not entitle employee to court review of the dismissal. * * *

"Dismissal of a federal employee in the classified civil service without trial because superiors have grounds which

to them are reasonably sufficient to believe that employee is disloyal to the government of the United States involves no rights of the employee and does not violate requirements of due process of law guaranteed by the Fifth Amendment."

In Norwalk Teachers' Ass'n. v. Board of Education, — Conn. — (decided July 31, 1951), 83 A2d 482, the court denied any right of public employees to strike, and in the course of its opinion said:

"In the American system, sovereignty is inherent in the people. They can delegate it to a government which they creat and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare."

While the case of Jeffries v. Election Commission, 294 Mich. 255, concerned rights in public office, the following statement contained therein might well be applied to one occupying a place of public employment. We quote:

"The question of property right in public office has been definitely settled in this State.

" 'A public office cannot be called "property," within the meaning of these constitutional provisions (United States Constitution, Fifth Amendment—due process, and Fourteenth Amendment—equal protection of law). If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they

are agencies for the State, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it.' *Attorney General, ex rel. Rich, v. Jochim,* 99 Mich. 358, 367."

Other decisions in this jurisdiction pertinent to the proposition that limitations or restrictions may be placed upon rights that public employees might otherwise possess, will be found in Fraternal Order v. Police Commissioners, 306 Mich. 68, certiorari denied, 321 US 784; Goodfellow v. Civil Service Commission, *supra;* State Lodge v. City of Detroit, 318 Mich. 182, certiorari denied, 332 US 818.

Because the decision in City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council, 94 Cal. App. 36, is applicable to various phases of the instant case, we quote somewhat at length from the headnotes of that case as reported in 210 P2d 305:

"Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.

"A strike which runs afoul of statute law or public policy is not entitled to legal protection and may be subject to legal restriction. * * *

"City of Los Angeles, having been lawfully empowered by its charter to furnish water and electricity to its inhabitants, is thereby performing a municipal and a public function, irrespective of whether it is acting in a proprietary or governmental capacity.

"To the extent that terms and conditions of public employment are governed by statute or charter, they are not subject to modification by contract, and concerted labor activity instigated for purpose of affecting terms and conditions is not sanctioned by law.

"Employment in public service frequently entails a necessary surrender of certain civil rights to a limited extent because of dominant public interest in unimpeded and uninterrupted performance of functions of government."

In view of the foregoing and also in accord with authorities hereinafter noted, it cannot be held, as defendants and cross-appellants contend, that by the Hutchinson Act the

striking employees of Detroit's street railway system are subjected to a statute which violates the United States Constitution (Art. 1, Sec. 9) and the State Constitution (Art. 2, Sec. 9), prohibiting passage of bills of attainder; nor that they are deprived of rights without due process of law (United States Constitution, Fifth Amendment; State Constitution, Art. 2, Sec. 16); nor of equal protection of the laws (United States Constitution, Fourteenth Amendment; State Constitution, Art. 2, Sec. 1). Nor are we in accord with cross-appellants' contention that this act impairs contractual rights possessed by employees of Detroit's street, railway system, in violation of constitutional provisions (United States Constitution, Art. 1, Sec. 10; State Constitution, Art. 2, Sec. 9). The Hutchinson Act cannot be held unconstitutional on any of the grounds just above noted.

Unconstitutionality of this act is also urged by cross-appellants on the ground that it restricts the right of employees to contract. We do not find in the act any restriction on the right of *employees* to contract. Instead, the restrictions on the right or power to contract are embodied in sections 3, 4a and 5 of the act. They are restrictions on and only on the power of the public employer to contract. The city of Detroit is merely one of the State's governmental agencies; and, subject to constitutional provisions, the State may limit or restrict the powers of such governmental agencies. City of Kalamazoo v. Titus, 208 Mich. 252.

Cross-appellants' and an intervening defendant's contention that the Hutchinson Act is unconstitutional because it transgresses Michigan's constitutional home rule provisions (State Constitution, Art. 8, Sec. 21-23), is answered by the fact that if the Detroit city charter, which authorizes the city to own and operate a street railway system, has in it provisions which conflict with the statutory law involved in this case, such charter provisions are invalid because Article 8, Section 21, of the State Constitution provides that such provisions are "subject to the Constitution and general laws of this state." Local Union No. 876 v. Labor Board, *supra.* See also, City of Kalamazoo v. Titus, *supra;* and Wood v. City of Detroit, 188 Mich. 547, wherein the headnotes in part read:

"Under the new Constitution (1908) the right of local self government granted to municipal corporations does not deprive the legislature of its authority to regulate such public instrumentalities by general enactments affecting their private governmental functions.

"No constitutional right of the corporation is infringed because the statute compels the municipality to respond in damages (workmen's compensation act) to servants who may have been injured without fault of the employer: since the legislature has the power to determine on what terms municipal corporations shall be allowed to engage in the employment of labor, if at all, the collective and individual rights of the citizens being duly preserved."

On this phase of the instant appeal cross-appellants and an intervening defendant-appellee rely very much on People v. Hurlbut, 24 Mich. 44. That case had to do only with a wholly different phase of law, and is not at all applicable to the instant case. The holding in the Hurlbut Case was to the effect that the legislature could not name or appoint the persons who should be the city's officers charged with purely local duties pertaining to the city's affairs, as is indicated by a headnote about to be quoted. No such issue is presented in the instant case.

"The legislature had no power to make the appointment of the members of the board of public works of the city of Detroit, as permanent officers for the full term, or the specific portions of such terms, provided by the act establishing such board (*3 Sess. L. 1871, p. 273*), for the respective members thereof. Permanent appointments for purely municipal purposes can only be made by municipal authority."

We are in accord with the holding of the trial judge that the employees of Detroit's street railway system are employees of the city of Detroit, and therefore are "public employees" within section 2 of the Hutchinson Act, which includes as a "public employee" any person "holding a position * * * or employment * * * in the service of any authority, commission, or board" in public service.

Conclusively these employees are in the city's service, having been so employed by Detroit's street railway commissioners, who are also city employees in charge of this street railway system, which is owned and controlled by the city of Detroit. The record on this appeal discloses that incident to acquiring and operating its street railway system the city of Detroit issued in large amounts full faith and credit bonds, and also so-called revenue bonds. In considering this phase of the case we are mindful of, but not in accord with cross-appellants' contention, that since the operation by the city of its street railway system is the exercise of a proprietary rather than a governmental function, the persons employed therein are not public employees, but instead are employees of Detroit's board of street railway commissioners, which by city charter provisions is authorized to contract for such employment.

"We have recognized that a municipality's operation of a public utility, although it may be a proprietary activity, constitutes engaging in a public enterprise for a public purpose." Wolgamood v. Constantine, 302 Mich. 384, 394.

"For the purpose of this case, the miners are employees of the Government, even though the private managers of the mines have been retained as operating managers for the Government and the regulations provide that none of the earnings or liabilities resulting from the operation of the mines are for the account or at the risk or expense of the Government." United States v. Mine Workers (syllabus), 330 US 258.

Contrary to cross-appellants' contention, it follows that the Hutchinson Act is applicable to those employed in Detroit's department of street railways.

In view of our holding herein, the injunctive relief sought by cross-appellants, which in part is that plaintiff be enjoined "from enforcing or applying or causing to be enforced or applied, Act 336 of the Public Acts of the State of Michigan for the year 1947 * * *," must be denied. And we also note that since prior to entry of decree the Detroit street railway employees returned to their employment, plaintiff-appellant is not asking for the injunctive relief

prayed in the bill of complaint filed May 18, 1951, which briefly was that defendants, their agents and employees, be restrained from participation in the then pending strike or picketing incident thereto.

Appellant's brief also presents the following questions as to which a declaratory decree is sought:

(1) "Prior to the strike, did the city have, and breach, any legal duty to mediate under the State Labor Mediation Board?"

We think this interrogatory must be answered in the negative. The Hutchinson Act, in section 7, provides the procedure by which either party to this type of a controversy may have a hearing before the State labor mediation board. In this case neither party complied with the prescribed procedure. The trial court was of the opinion that the city had breached its legal duty to submit to mediation, and accordingly decreed that: "Both parties shall resume formal mediation before the State Labor Mediation Board." Evidently the circuit judge based his conclusion in this respect on the fact that on April 20, 1951, both the State and Federal mediation representative sought to obtain the consent of both parties to this controversy to submit to mediation. In consequence Mr. Hough, who was the labor relations counsel of the department of street railways and who had taken part in negotiations between these litigants, at first agreed to meet with the Federal labor conciliator and the representative of the State labor mediation board, together with the union representatives. But, shortly thereafter and before the time set for the meeting, Mr. Hough cancelled this arrangement in the belief that he did not at that time have authority to participate in such a meeting. There had been no prior mediation, but only negotiations between the parties. Since demand for mediation had not been made by either party in the manner provided by the statute, we cannot agree with the conclusion of the circuit judge that the noted incident constituted a breach on the part of the city to submit to mediation, and therefore we are not in accord with the above noted provision in the circuit court's decree.

(2) "After the strike can, and must, the city offer and give the strikers an opportunity to return to work under the terms, conditions, rights and benefits under which they were working before they struck, and without the penalties of Act 336 P.A. 1947; so accept them; and continue to so treat them?"

In view of our conclusion that the Hutchinson Act is constitutional and applicable to the employees of Detroit's street railway system, the foregoing question must be answered in the negative.

(3) "Is it now the city's legal duty to mediate, and continue to mediate, with the returned strikers, under the State Labor Mediation Board?

While we know of no reason in law why the city might not voluntarily submit to mediation the matters involved in this controversy, under the instant record it must be held that such is not a "legal duty" of the city; but obviously mediation, if desired, may be brought about by either party by complying with the provisions of section 7 of the Hutchinson Act.

(4) "Can the city, within one year, pay the returned strikers any increase in base or hourly wage rate which would come only from its savings resulting from 'fringe' changes?"

The expression "fringe" includes payments for overtime, report and turn-in time, spread time, sick leave, holiday pay, etc. Concerning this phase of the appeal, the following is stated in the city's brief:

"Before the strike, in the negotiations, the city tried to eliminate or change some of the old 'agreement's' terms as to 'fringes' and to thereby effect a reduction or saving to the city in the gross amount of all the money or 'compensation' it was paying for operators' work. This saving the city was willing to use to increase the hourly or 'base' rate of pay. * * * The Union, always insistent on an increase in the hourly rate first, never agreed to any of these suggested 'fringe' changes, and struck."

As a matter of fact, negotiations between these parties terminated because of the controversy as to the constitu-

tionality of the Hutchinson Act, and without reaching any agreement or disagreement as to the right of the city to increase the employees' base pay by minimizing the amount heretofore expended incident to the "fringe" provisions of the former contract.

Cross-appellants in their brief concerning this phase of the record say: " * * * we fully agree with the city. We see no impediment under the Hutchinson Act." In view of the foregoing it is obvious that this interrogatory, which pertains to a matter which was not decided by the lower court, relates to a supposititious issue concerning which the record does not disclose there is disagreement between the parties. In consequence an issue for a declaratory decree in this respect is not presented. Grosse Pointe Shores v. Ayres, 254 Mich. 58; cited and quoted in School District No. 1, Fractional v. School District of the City of Lansing, — Mich. — (Decided December 3, 1951).

Neither party having fully prevailed, no costs will be awarded. A decree may be taken in this Court in accordance with our opinion herein.

APPENDIX "B"

OPINION

Trial Court—Cohn v. Detroit, et al.

No. 475,156

AVERN L. COHN, *Plaintiff*,

v.

CITY OF DETROIT, ET AL., *Defendant*

No. 475,181

CITY OF DETROIT, *Plaintiff*,

v.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, *Defendant*

OPINION—Filed June 5, 1951

I am going to dispose of Mr. Cohn's case now as I think it will perhaps serve to clear the air and enable Mr. Cohn

to take such action as he may desire to do on behalf of himself and others whom he says he represents.

I probably should have immediately taken up his lawsuit, but I thought that it was wise to try to help negotiate a fair interim arrangement to secure transportation for the public and an orderly disposition of legal questions.

In that we were so far unsuccessful, but I am still hopeful.

I have now in the record such facts as we have been able to agree upon, which have been included in the pre-trial statement and will be made a part of the record and is by reference made a part of this opinion, and I have listened to the arguments of all who want to be heard.

The first question I shall dispose of is the first question Mr. Barnard raised: Has the Court jurisdiction to entertain Mr. Cohn's case?

It is in the record that he is a taxpayer and a patron of the streetcars and busses. It is also in the record that there are many bonds pledging the full faith and credit of the City outstanding. I have just been handed a memorandum showing $32,000,000 worth of City bonds outstanding, for which the assets and income of the Street Railway System is a base, but which are further supported by faith and credit of the City.

I will dispose then of Mr. Barnard's motion to dismiss in the final decree which I am going to order in this case. I think that may enable an immediate review and a determination of this as well as the other legal issues raised in his bill of complaint.

Second: Shall the Court restrain the Mayor and the Board of Street Railway Commissioners from enforcing the terms of the Hutchinson Act so-called against the employes of the Street Railway Commission?

This would be justified if the Court thought the Act unconstitutional. We may say that we do not like the Act, and we do not like it because it is self-executing. It deprives the Court of the power constructively to work out a solution of the problem which has been brought before it.

But as Justice Holmes first said, and it has been repeated by judges passing on constitutional questions ever since, the Court does not make the law. That is solely the duty of

Legislature. They have a responsibility equal to that of the Courts. Theirs is the duty to enact the laws. Nor does it enforce the law. That is solely the duty of the Executive.

So the Court's duty in this case is to decide the legal question. The first one is as to the constitutionality of the law—the so-called Hutchinson Act. The only legal question there to decide: Was it within the power of the Legislature to enact such a law? The answer is yes.

The state or the municipality may fix the terms and conditions of public employment. We pointed this out just a few months ago at length in

Green v. City of Detroit, Our No. 453, 757.

and I noticed in the newspapers this morning that approximately the exact question passed upon there was determined by the Supreme Court of the United States yesterday and supported our position in the Green case.

We based our decision there largely on Justice Holmes in the early case of

McAuliffe v. Mayor of New Bedford, 155 Massachusetts 216.

In that case the employe was a policeman. In discussing his constitutional rights, the Court said:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

Public Service is a privilege and not a right.

The second legal question then: Should the Court restrain the Mayor from enforcing this law?

Having found that the Legislature had the power to enact the law, having found thereby that it has deprived no public employe of his constitutional right, the answer is no.

Whether or not these defendants, employes of the Department of Street Railways are public employes, we leave open. The question is not raised in Mr. Cohn's case. It is raised and will be determined in the City's case, which we shall proceed immediately to try.

Next: Shall the Court order the men back to work under the terms of the Hutchinson Act we have just found constitutional?

The only penalty is that they may be discharged. They have been discharged. The law provides the conditions on which they may return to work. The law itself gives the Court no authority to order the men back to work. In fact, it denies it.

The recent Supreme Court case of

> Amalgamated Association of Street and Coach Employees v. The Wisconsin Employment Relations Board

which we have discussed somewhat at length here, declared unconstitutional an act similar to the Hutchinson Act, different only in that the Wisconsin Act sought only to compel arbitration of the employes of public utilities and not to legislate about the employment of public employes, that being specifically exempted from the Taft-Hartley Act, so I see no confusion between this case and that.

Without the statute, the Court has no power to order an employe to return to work. It would be an invasion of his constitutional rights. Its only enforcement would be by imprisonment, which would deprive him of his right to liberty, of which he may be deprived only by due process of law.

The other question raised by Mr. Cohn to determine the City's and the employes rights to a declaratory judgment is more elaborately pleaded by both sides in the City's case against the Union and may be more equitably disposed of there.

For the reasons stated, therefore, a decree may be entered denying the plaintiff the relief sought and the Court will cooperate to facilitate an immediate appeal, Mr. Cohn.

Since the Act is in the public interest, no costs will be taxed.

IRA W. JAYNE,
Circuit Judge.

Dated: June 5, 1951.

APPENDIX "C"

OPINION

Trial Court—Division 26, etc. v. Detroit, et al.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN CHANCERY

No. 475-181

CITY OF DETROIT, a Municipal Corporation, by and through Fred P. Sisson, Rodney Baxter, and Herman L. Moekle, as and constituting the Board of Street Railway Commissioners of the City of Detroit, Plaintiffs,

vs.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, Patrick McIntyre, individually and as President of said Division 26; Robert Holloway, individually and as Vice-President of said Division 26, Walter Stanley, individually and as Business Agent of said Division 26, John Francis, individually and as Secretary-Treasury of said Division 26, Ivor M. Mullins, individually and as Sergeant-at-Arms of said Division 26, George Knoppe, Thomas Woof, John R. Glabas, Ralph Holman, Cornelius O'Sullivan, George Stocks, Thomas Nagle, Albert Riley, Russell Goyer, Joseph Silverthorn, Leroy McKesson, David Latimer, individually and as Board Members of said Division 26, John Doe and Richard Roe, whose persons are well known, but whose names are unknown, Defendants,

and

UNITED D. S. R. EMPLOYEES LOCAL 312, CIO., affiliated with Government Civic Employees Organizing Committee, C. I. O., an unincorporated voluntary association, and International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., an unincorporated voluntary association, Intervening Defendants

OPINION OF THE COURT—Filed June 12, 1951

The Court: I think I ought to state on the record, by reason of the fact that I am about to state my opinion in

this matter immediately after the conclusion of the arguments, that we have all been very close to this case for several days. And during the time, especially when I was working on the pre-trial statement, I heard practically all of these legal arguments develope more or less fully and have given some thought to the matter myself.

So in the interest of an early determination of this matter, and that both the parties may know what I conceive to be their rights, I am going to state now my opinion on the matter.

So much of it is in an agreed statement of facts at the pre-trial hearing that there is no point in rehearing it.

Both parties, the Board of Street Railway Commissioners and the defendant Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America and their officers, have submitted their controversy to this court of equity by bill and cross-bill. By so doing they have acknowledged the jurisdiction of the court.

The controversy between the parties revolves around Act No. 336 of the Public Acts of 1947, commonly called the Hutchinson Act.

The first question raised by the defendant challenges the constitutionality of the Act. We have recently held the Act constitutional in Avern L. Cohn v. City of Detroit, Chancery No. 475-156.

The finding there, we shall adopt here. (See attached opinion.) The Act is Constitutional.

Mr. Rothe, at the argument, just cited me this case of People in the Relation of the Board of Park Commissioners vs. The Common Council as authority for the law that the Legislature cannot pass this kind of an Act. I need only to read to him one of the head notes:

> "The compulsory authority of the Legislature of municipal corporations considered and held that as regards matters of general concern, the duties which the people of the several localities owe to the commonwealth at large in control of the state is complete, and no discretionary authority is vested in such corporations."

This is legislation affecting the public good of the whole state. In the case which he cites me, the Legislature attempted to legislate for the City of Detroit on a purely local matter applying to parks.

The next question raised is the contention of the defendants that, even though the Act is unconstitutional, they do not come under the purview of the Act.

In other words, the defendants claim that they are not public employees and cite a line of cases holding that when a municipality engages in an activity frequently performed by private individuals and in competition with them, that it is performing a proprietary function and not a public function, and therefore is governed by the laws governing controversies between individuals.

This distinction has been built up by Courts of law principally to facilitate their—that is the departments of the municipalities—making of contracts, as Judge Krause opined in the opinion that was cited to me without the red tape of the usual safeguards surrounding the acts of public officials and to facilitate holding the public authority liable for the torts of its servants in courts of law.

This rule of law does not remove the employes from the classification of public employees in their relations and responsibilities to government.

The employees of the DSR are protected by the rules of civil service. They benefit by the municipal pension system. Their relations with the City are governed by the Charter. They cannot accept the benefits of public employment and deny its responsibilities and restrictions. They come within the provisions of the Act.

And Mr. Barnard, I listened carefully, has shown me no case or authority to the contrary.

The next issue is an issue of fact requiring an analysis of the acts of the parties leading up to the break in their relations and the strike.

The court has permitted testimony, not only as to that, but also as to the actions of the parties following the strike and preceding the filing of this bill of complaint on the contention of the defendants that the plaintiffs did not negotiate in good faith.

We find that there was no bad faith in the commonly accepted meaning of the terms on either side, and therefore we hold that the testimony following the strike is material only to determine that fact.

However, the acts of the parties from the time that they began to negotiate the 1951 contract until the negotiations were broken off, require an analysis to determine the cause for the break under Section 7 of the Act, the pertinent part of which reads as follows:

> "Upon the request of a majority of any given group of public employees evidenced by a petition signed by said majority and delivered to the labor mediation board, or upon request of any public official in charge of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievances set forth in said petition or notice, and for the purposes of mediating such grievances, the labor mediation board shall exercise the powers and authority conferred upon said board by sections 10 and 11 of No. 176 of the Public Acts of 1939."

In this case it will be noted that the plaintiffs have dealt with the union, its officers and representatives, for a number of years, recognizing them as the bargaining agents; that they have brought this action against them as such, as representatives of all the members of the Union; and that they contend that all of the members of the Union are bound by the representations of these defendant officers. In fact, the plaintiff continues to recognize the Union organization as the representatives of the defendants by directing this lawsuit against them.

We have analyzed the exchange of telegrams from the records of the State Labor Mediation Board and the testimony of its commissioner, George E. Bowles. We have listened to the testimony of those who participated in these negotiations up until the time that they were broken off.

Perhaps both parties were badly advised as to the scope and meaning of the Hutchinson Act. The employees did not individually sign a petition asking for the mediation to which they were entitled under the law. Equity, how-

ever, looks to the substance rather than the form.

At no time did the plaintiff suggest a technical compliance with the provisions of the Act. They accepted the Union and its officers and representatives as the parties with whom to deal. They waived the technical compliance.

The Attorney General, in Opinion No. 662, says among other things in discussing this Section 7:

> "* * * It shall be the duty of the Board; to invite the disputants and/or their representatives to attend such conference and submit, either orally or in writing, the grievance of and differences between the disputants."

And in another place:

> "After the Board has received the above notice, or"

and he emphasizes this

> "upon its own motion in an existing, imminent or threatened labor dispute, the Board may and, upon the direction of the governor, the Board must take such steps, etc."

Whether or not the Mediation Board or the defendants took the first step in requesting mediation, is immaterial.

The exchange of telegrams fairly discloses that the defendants were ready to mediate under the provisions of the law if their rights to test the constitutionality of the Act were preserved. And it must be noted that the constitutionality of the Act has not yet been determined by a court of last resort. The plaintiffs, Board of Street Railway Commissioners, stopped the steps which were leading to a mediation under the provisions of the Act.

Mr. Hough, who describes himself as the Labor Relations Counsel of the plaintiffs, stated in answer to direct questions from his own counsel among other things, I will not take the time to read it now, after describing the plans for this meeting at 7:30 of a certain night;

> "And when it was said that I promised to go, that is true. I did promise. After talking with him, I

> immediately conferred with the three members of my committee and each of them pointed out to me that in their opinion"

and then he was interrupted. His next answer is:

> "After having consulted with the members of my committee, I called Mr. Diehl back. I believe it was within about an hour or two hours, and advised him that in my opinion we had no authority to go and that we should not go and please cancel the meeting."

In that connection, I find as a fact that the Labor Relations Counsel had been given authority and was conducting those negotiations, when this act stopped those negotiations for mediation, as had been suggested by the State Labor Mediation Board.

Equity abhors forfeitures. A minority of the employees voted against the strike. It is fair to assume that many were the older men who had the most at stake with their accumulated seniority and pension rights. To forfeit those rights without recourse does not appeal to the conscience of the court.

All the defendants have been punished, severely, already by a loss of several hundred dollars of wages each. Their representatives have repeatedly stated that they will comply with the terms of the Act when told what it is. They should be given that opportunity; that is, to return to work under the terms and conditions under which they were working when the strike occurred. The plaintiffs should accept them under those conditions and resume a formal mediation under the State Labor Mediation Board as the Act provides.

The plaintiff, Board of Street Railway Commissioners have asked for a declaration of rights.

This opinion declares not only their rights, but their obligations. They must offer the men an opportunity to return under the terms of the Act, but as of the time when the negotiations for mediation were broken off.

If that opportunity is accepted by the Union, that disposes of the matter. If it is declined, it may be necessary

for me to determine the further contention of the plaintiffs that the defendants are unlawfully interfering with their conduct of the management of their transportation system. But as of this time under this opinion, a finding on that issue becomes unnecessary.

A decree embodying the provisions of this opinion, so far as they declare their respective rights of the parties, may be prepared.

IRA W. JAYNE,
Circuit Judge.

APPENDIX "D"

HUTCHINSON ACT

Act 336, Mich. P. A. 1947; Mich. C. L. '48, Sec. 423.201, et seq; M. S. A. 17.455(1), et seq.

HUTCHINSON ACT

Act 336, 1947 eff. Oct. 11

An Act to prohibit strikes by certain public employees; to provide certain disciplinary action with respect thereto; to provide for the mediation of grievances; and to prescribe penalties for the violation of the provisions of this act.

The People of the State of Michigan enact:

Sec. 1. As used in this act the word "strike" shall mean the failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment: *Provided, however,* That nothing contained in this act shall be construed to limit, impair or affect the

right of any public employee to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment.

Sec. 2. No person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a "public employee," shall strike.

Sec. 3. No person exercising any authority, supervision or direction over any public employee shall have the power to authorize, approve or consent to a strike by 1 or more public employees, and such person shall not authorize, approve or consent to such strike, nor shall any such person discharge or cause any public employee to be discharged or separated from his or her employment because of participation in the submission of a grievance in accordance with the provisions of section 7 of this act.

Sec. 4. Notwithstanding any other provision of law, any public employee who violates the provisions of this act shall thereby abandon and terminate his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, including pension or retirement rights or benefits, except if appointed or reappointed as hereinafter provided.

Sec. 4a. The provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the power exists in the legislature to control employment by the state or the emoluments thereof.

Sec. 5. Notwithstanding any other provision of law, a person knowingly violating the provisions of this act may subsequent to such violation be appointed or reappointed,

employed or re-employed, as a public employee, but only upon the following conditions:

(a) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;

(b) The compensation of such person shall not be increased until after the expiration of 1 year from such appointment or reappointment, employment or re-employment; and

(c) Such person shall be on probation for a period of 2 years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body.

Sec. 6. Notwithstanding the provisions of any other law, any person holding such a position who, by concerted action with others, and without the lawful approval of his superior, wilfully absents himself from his position, or abstains in whole or in part from the full, faithful and proper performance of his duties shall be deemed to be on strike: *Provided, however,* That such person, upon request, shall be entitled, as hereinafter provided, to establish that he did not violate the provisions of this act. Such request must be filed in writing, with the officer or body having power to remove such employee, within 10 days after regular compensation of such employee has ceased. In the event of such request such officer or body shall within 10 days commence a proceeding for the determination of whether the provisions of this act have been violated by such public employee, in accordance with the law and regulations appropriate to a proceeding to remove such public employee. Such proceedings shall be undertaken without unnecessary delay. The decision of such proceeding shall be made within 10 days. In the event that the employee involved is held to have violated this law and his employment terminated he shall have the right of review by way of petition to the labor mediation board, as provided for in section 7 of this act.

Sec. 7. Upon the request of a majority of any given group of public employees evidenced by a petition signed

by said majority and delivered to the labor mediation board, or upon request of any public official in charge of such employees, it shall be the duty of the labor mediation board to forthwith mediate the grievances set forth in said petition or notice, and for the purposes of mediating such grievances, the labor mediation board shall exercise the powers and authority conferred upon said board by sections 10 and 11 of Act No. 176 of the Public Acts of 1939.

Section 8. Any person not a public employee who shall knowingly incite, agitate, influence, coerce, or urge a public employee to strike shall be deemed to be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not to exceed 1 year, or by a fine of not less than $100.00 nor more than $1,000.00, or both such fine and imprisonment in the discretion of the court.

APPENDIX "E"

DECREE

Trial Court

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE IN CHANCERY

No. 475-181

CITY OF DETROIT, a Municipal Corporation, by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and Constituting the Board of Street Railway Commissioners of the City of Detroit, *Plaintiffs*,

vs.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, Individually and as President of Said Division 26; ROBERT HOLLOWAY, Individually and as Vice-President of Said Division 26, WALTER STANLEY, Individually and as Business Agent of Said Division 26; JOHN FRANCIS, Individually and as Secretary & Treasurer of Said Division 26; IVOR M. MULLINS, Individually and as Sergeant-at-Arms of Said Division 26; GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, Individually and as Board Members of Said Division 26, JOHN DOE and RICHARD ROE, Whose Persons Are Well Known, But Whose Names Are Unknown, *Defendants*,

and

UNITED DSR EMPLOYEES LOCAL 312 C.I.O., Affiliated with Government Civic Employees Organizing Committee, C.I.O., an Unincorporated Voluntary Association, and INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., an Unincorporated Voluntary Association, *Intervening Defendants*

Decree

(Filed June 26, 1951)

At a session of said court held at the courthouse for Wayne County, in the County Building, in the City of Detroit, Michigan, on the 26th day of June, A.D. 1951.

Present: The Hon. Ira W. Jayne, Circuit Judge

The above entitled cause having come on for trial and having been tried, upon the pleadings and proofs having been taken in open court, and on the facts stipulated at pre-trial hearings, the plaintiff in its bill of complaint and the defendants in their cross-bill, having each prayed for a declaration of rights as to the constitutionality and the applicability of Act 336 of the Public Acts of the State of Michigan for the year 1947, and the plaintiff also having prayed for injunctive relief and the court having filed its opinion thereon and the record having thereafter been supplemented as to events transpiring after the filing of said opinion;

It is hereby ordered, Adjudged and Decreed That:

I. Act No. 336 of the Public Acts of 1947, commonly known as the Hutchinson Act, was at the time the controversy between the parties arose and still is a constitutional law of the State of Michigan and applicable to the plaintiff and all of its employees, including the defendants; the members of Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, the members of the United D.S.R. Employees, Local 312, Local Industrial Union affiliated with C.I.O., and International Union, and the members of the United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O.

II. The plaintiff shall continue to treat the employes who have returned to their employment under the conditions as they existed prior to the time they quit that employment, and shall reinstate them with such rights and benefits as they had at the time that negotiations were broken off on, to-wit, April 20, 1951. The defendants shall

continue to work in recognition of the validity of Act 336, including its penalties, from the time of this decree.

III. Both parties shall resume formal mediation before the State Labor Mediation Board.

IV. It appearing that the parties have resumed the operation of the transportation system, plaintiff's prayer for injunctive relief is denied.

V. All other relief prayed for by the bill of complaint and by the cross-bill of complaint, which is not herein specifically granted is denied.

VI. A public question being involved, the decree is entered without costs.

IRA W. JAYNE,
Circuit Judge.

APPENDIX "F"

DECREE

Mich. Supreme Court

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Fourteenth day of March, in the year of our Lord One Thousand Nine Hundred and Fifty-two.

Present the Honorable Walter H. North, Chief Justice; Emerson R. Boyles, Neil E. Reid, John R. Dethmers, Henry M. Butzel, Leland W. Carr, George E. Bushnell, Edward M. Sharpe, Associate Justices.

CITY OF DETROIT, a Municipal Corporation, by and Through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and Constituting the Board of Street Railway Commissioners of the City of Detroit, *Plaintiff, Appellant and Cross-Appellee,*

vs.

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, Individually and as Presi-

dent of Said Division 26; ROBERT HOLLOWAY, Individually and as Vice-President of Said Division 26, WALTER STANLEY, Individually and as Business Agent of Said Division 26; JOHN FRANCIS, Individually and as Secretary & Treasurer of Said Division 26; IVOR M. MULLINS, Individually and as Sergeant-at-Arms of Said Division 26; GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY MCKESSON, DAVID LATIMER, Individually and as Board Members of Said Division 26, JOHN DOE and RICHARD ROE, Whose Persons Are Well Known, But Whose Names Are Unknown, *Defendants, Appellees and Cross-Appellants,*

and

UNITED DSR EMPLOYEES LOCAL 312 C.I.O., Affiliated with Government Civic Employees Organizing Committee, C.I.O., an Unincorporated Voluntary Association, and INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., an Unincorporated Voluntary Association, *Intervening Defendants and Appellees*

DECREE

The above cause having come on to be heard upon appeal by the plaintiff City of Detroit from the Decree of the Circuit Court for the County of Wayne, Hon. Ira W. Jayne, Presiding, and upon the cross-appeal of the original defendants and the record of the proceedings in the Circuit Court having been duly filed with this Court and briefs having been filed and the matter argued by counsel for the respective parties and this Court having heretofore rendered its opinion in this matter, which said opinion is incorporated herein by reference. Now, therefore,

It is ordered, adjudged and decreed and this Court doth hereby Order, Adjudge and Decree that Act 336 of the Public Acts of 1947, commonly known as the Hutchinson Act, is a constitutional law of this State and does not violate the United States Constitution (Article I, Section 9),

and the Michigan State Constitution (Article II, Section 9,) prohibiting the passage of bills of attainder; nor the United States Constitution, Fifth Amendment and the State Constitution (Article II, Section 16), forbidding the deprivation of rights without due process of law; nor the United States Constitution, Fourteenth Amendment, and the State Constitution (Article II, Section 1), requiring the equal protection of the laws; nor the United States Constitution (Article I, Section 10), and the State Constitution (Article II, Section 9), forbidding the impairment of contractual rights, nor the State Constitution (Article VIII, Sections 21 to 23, inclusive), being the grant of local self-government to home rule cities.

It is further ordered, adjudged and decreed that the defendants and cross-appellants, members of Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, being employees of the City of Detroit, Department of Street Railways, are public employees within the terms of Act 336 of the Public Acts of 1947 and that said Act is applicable to the plaintiff and appellant, City of Detroit, and to its employees in said City's Department of Street Railways, including the defendants and cross-appellants.

It is further ordered, adjudged and decreed that the injunctive relief sought by defendants and cross-appellants, including the prayers that plaintiffs and appellants be enjoined from enforcing or applying or causing to be enforced or applied the provisions of Act 336 of the Public Acts of 1947, be and the same is hereby denied.

It is further ordered, adjudged and decreed that Act 336 of the Public Acts of 1947 imposes no Local Duty to mediate under the State Labor Mediation Board until there has been compliance with Section 7 of said Act; that there has been no compliance with said section by the parties hereto and that prior to the strike of the employees of the Department of Street Railways, defendants and cross-appellants herein, the plaintiff and appellant City of Detroit did not have nor breach any legal duty to mediate under the State Labor Mediation Board, nor is it now, in the absence of the required compliance with Section 7 the duty of plaintiff and

appellant City of Detroit to mediate or continue to mediate with the strikers under the State Labor Mediation Law.

It is further ordered, adjudged and decreed that after the strike the plaintiff and appellant City of Detroit was under no legal duty to re-employ or reappoint its former employees who struck in violation of the terms and conditions of Act 336 of the Public Acts of 1947, nor could the said city reappoint or re-employ said former employees except under the conditions set forth in Section 5 of said Act.

It is further ordered, adjudged and decreed that no issue for a declaratory decree is presented as to the proposition that substituting increases in base pay for fringe payments costing a comparable amount of money is not an increase in compensation as defined by Act 336 of the Public Acts of 1947.

It is further ordered, adjudged and decreed that the decree of the Circuit Court for the County of Wayne is hereby modified in accordance herewith.

It is further ordered, adjudged and decreed that no costs will be awarded.

(2930)

2

FILED
JUL 17 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ETC., ET AL., *Appellants,*

vs.

CITY OF DETROIT, A MUNICIPAL CORPORATION, ETC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OF THE CITY OF DETROIT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

PAUL T. DWYER,
JAMES H. LEE,
WALTER E. VASHAK,
BERT R. SOGGE,
HELEN W. MILLER,
JAMES S. SHIELDS,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, INDIVIDUALLY AND AS PRESIDENT OF SAID DIVISION 26, ROBERT HOLLOWAY, INDIVIDUALLY AND AS VICE-PRESIDENT OF SAID DIVISION 26, WALTER STANLEY, INDIVIDUALLY AND AS BUSINESS AGENT OF SAID DIVISION 26, JOHN FRANCIS, INDIVIDUALLY AND AS SECRETARY-TREASURER OF SAID DIVISION 26, IVOR E. MULLINS, INDIVIDUALLY AND AS SERGEANT-AT-ARMS OF SAID DIVISION 26, GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, INDIVIDUALLY AND AS BOARD MEMBERS OF SAID DIVISION 26, *Appellants,*

vs.

CITY OF DETROIT, A MUNICIPAL CORPORATION, ETC., ET AL.

STATEMENT OF APPELLEE, CITY OF DETROIT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM AND PROOF OF SERVICE

STATEMENT OF APPELLEE, CITY OF DETROIT, OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Comes Now the appellee, City of Detroit, a municipal corporation, by and through Fred P. Sisson, Rodney Baxter

and Herman L. Moekle, as and constituting the Board of Street Railway Commissioners of the City of Detroit, and files its statement in opposition to appellants' statement as to jurisdiction and hereby moves the Court to dismiss the appeal herein or affirm the decision and decree of the Supreme Court of Michigan, from which said decision and decree said appeal is taken.

THIS APPEAL RAISES ONLY THREE QUESTIONS, ALL AS TO THE CONSTITUTIONALITY OF THE HUTCHINSON ACT, ACT 336 OF THE MICHIGAN PUBLIC ACTS OF 1947, NO ONE OF WHICH THREE IS A SUBSTANTIAL FEDERAL JURISDICTIONAL QUESTION.

I

Facts, Issues and The Hutchinson Act

(A) Facts

Appellants have admitted that they struck under such circumstances as are prohibited by the Hutchinson Act; have admitted stopping transportation service in Detroit for days; have admitted being found by the City to have violated the law and to have terminated their employment; and have admitted that they were discharged under the common law and civil service and were offered hearings (R. 71-74).

Appellants have never claimed, and do not here, claim that thereafter Appellants sought and were denied any hearings, or had hearings, or appealed therefrom; nor do they now claim here that their striking was not forbidden by the Hutchinson Act, if valid.

(B) Issues

Appellants here rely solely on the bare claims that the Hutchinson Act violates the Federal Constitution's provisions as to:

(1) due process,
(2) equal protection, and
(3) bills of attainder.

These three claims of unconstitutionality of the Act, Appellants have further restricted by saying:

> "No statute similar to the Hutchinson Act has come to our attention save in those several states where practically identical statutes have been adopted. We are not here asserting a right to strike on the part of municipal employees. We are assuming that its prohibition is within the legislative powers of the state. But for the statute to *operate directly* upon the employees, without regard to the desires of their employer, or much less, any decision of an impartial tribunal, and impose 'disciplinary action' and 'penalties' for striking seems to us arbitrary, and clearly in violation of the constitutional provisions invoked."
> (*Appellants' Jurisdictional Statement*, p. 27.)

(C) The Hutchinson Act

(1) *The Act Itself Does Not "Operate Directly" on Anyone*

The Hutchinson Act itself does not declare that any particular individual or any particular class of individuals has struck.

The Act merely forbids a public employee to strike; requires that striking terminates his job and its emoluments unless (a) he is reinstated, which can only be by hearing, or (b) he is reappointed, which must be without a pay raise for one year and without tenure for two. It affords him (1) a

right to establish, by request and hearing, that he did not strike and thus it affords him an opportunity for reinstatement, and (2) a right to another hearing by the Michigan Labor Mediation Board.

It does not bar his common law rights to appeals by certiorari from either hearing to the courts.

Since 1947 the Hutchinson Act had been the law, and had not, in and of itself, discharged, operated directly on, or ever affected anyone; until Appellants themselves, knowing that under the Act their striking would be an abandonment of their employment, deliberately did the very thing which first brought the Act into operation, and they thus deliberately abandoned their employment and discharged themselves. The Act itself did not discharge them.

The Act cannot itself discharge, operate upon, or affect, any public employee until he strikes. Then the Act says that he "shall be deemed on strike" (Sec. 6)—by those public officials whose duties require that normally they either (a) "deem" him to be, and treat him as, an employee to carry out public business, or (b) "deem" him not to be an employee and then hire someone else to continue the public business. To this extent, in the first instance, the officials must decide the question as to whether the employee did or did not strike. If the officials decide that the employee did strike, then the law first operates upon him and says the officials must treat his employment as terminated.

Thus, for the Act to "operate" at all—first the employee must strike. Then the Act requires the public officials to decide that he struck from which decision termination of employment follows.

Therefore the Hutchinson Act itself does not operate directly on anyone.

The Statute Does Not "Operate • • • Without • • • Any Decision of an Impartial Tribunal"

From this decision that the employee struck, he can appeal by hearing, and then also he can again appeal to the Labor Mediation Board for another hearing—from either of which hearings there is the further appeal to the courts by certiorari.

The statute provides for these two hearings and does not affect the common law right of appeal by certiorari to the courts.

The Statute Does Not Entirely "Operate • • • Without Regard to the Desires of Their Employer"

The Act requires that, in the first instance, the public officials make a finding as to whether or not the employee struck and then requires that if he struck, his employment terminate; but it affords the employee a hearing by the officials on this finding. It also permits the officials, regardless of any decision on that hearing that the employee did strike, to re-hire the striker at pre-strike pay for one year and without tenure for two. Thus the "employer", even in rigid obedience to the Act, is not required by the Act to discharge anyone who does not strike, nor to refuse re-employment to one who has struck.

"Disciplinary Action" and "Penalties"

The Act imposes no "disciplinary action" or "penalties" except (1) the above discharge, which is subject to hearings and appeals to the courts, and (2) the above conditions of the striker's re-employment—both of which are only the means which the Legislature thought reasonable and necessary, in the exercise of police powers, to discourage public employees striking.

The Act, in Operation, Is Not "Arbitrary"

The Act is far less "arbitrary" than Appellants' voting not to arbitrate but to strike in violation of it, a vote described by their Business Agent as follows:

> "The vote that was taken was whether to arbitrate the entire contract or strike the property. The vote that was taken expressed the wish of our men not to arbitrate the entire contract, but failing to get what they thought they were fairly entitled to, to strike the property" (R. 195).

Nor is the Act as "arbitrary" as those strikers greatly inconveniencing the public in Metropolitan Detroit for 59 days.

II

Appellants' Claim That the Hutchinson Act Violates Due Process, Raises No Substantial Federal Constitutional Question.

(A) Appellants Never Had Any Constitutional "Property" or Other "Rights" in Their Jobs and so the Act Did Not Deprive Them of Any Such "Rights"

Appellants have disclaimed "a right to strike on the part of municipal employees", and admit that the State can forbid such strikes; but they still claim a constitutional "property" right under "due process" to retain their positions while striking.

To violate the due process clause, there must be a deprivation of life, liberty or property. There is no such deprivation in the case before this Court. The Hutchinson Act, in placing restrictions on further public employment of those who violate its mandates, deprives the former employee of no right within the meaning of the due process clause.

Before the Hutchinson Act, at common law, a public employee who struck could be discharged. He had no constitutionally-guaranteed "property" or "contract" "rights", owed him as an "obligation of contract", to retain his job while striking. *Goodfellow* v. *Detroit*, 312 Mich. 226.

Such non-existing constitutional "rights" could not be taken away by the Hutchinson Act.

The Act merely forbids a public employee to strike (which before the Act, was illegal); requires that his striking terminates his job and its emoluments (which, before the Act, his striking could constitutionally terminate); imposes two new conditions, no pay raise for one year and no tenure for two, on his re-employment (which re-employment, before the Act, constitutionally could have been absolutely denied him, or granted him on these two, or any, conditions). The Act also affords him the new rights (not had by common law) to establish, by requested hearings and by appeals that he did not strike.

If the people's established governments are limited by such claimed constitutional "rights" and therefore are forbidden by the Federal Constitution to so legislate,—if the people cannot replace publicly employed strikers to continue the necessary activities of government but must indefinitely suspend all activities of government until the strikers possibly may be pleased to reaccept their jobs and job rights—then all activities of government must stop and eventually government itself must utterly cease.

In *United Public Workers* v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. 754, a suit to enjoin enforcement of, and to have declared unconstitutional, that portion of the Hatch Act which forbids Federal employees "to take any active part in political management or political cam-

paigns"—the United States Supreme Court affirmed summary judgment for defendants, saying:

> "Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes. The requirements of residence and age must be met. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery. The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." (330 U. S. 95-96, 67 S. Ct. 567, 91 L. Ed. 770-771).
>
> "To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system." (330 U. S. 99, 67 S. Ct. 569, 91 L. Ed. 772).
>
> "We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. • • • When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need.

We cannot say with such a background that these restrictions are unconstitutional." (330 U. S. 102-103, 67 S. Ct. 571, 91 L. Ed. 74).

In *Bailey* v. *Richardson*, 182 Fed. 2d 46 (Aff. Mem. Op. 341 U. S. 918, 71 S. Ct. 669, 95 L. Ed. 1352), Dorothy Bailey, a member of the Federal classified civil service, was laid off and then reinstated subject (by civil service regulation) to removal if in the next 18 months investigation might disclose her disqualification. In that time investigation disclosed evidence of reasonable grounds for believing her disloyal. A Regional Loyalty Board finding that such grounds existed, on appeal was sustained by a panel of the Loyalty Review Board, whose Chairman so advised the Federal Security Agency and requested the Agency to remove her. The full Loyalty Review Board declined to reverse the panel's decision. Miss Bailey sought a Federal District Court declaratory judgment against these Federal agencies, claiming violation of due process in her being deprived of her job without a judicial hearing. The Federal Agencies moved for, and received, a declaratory judgment, which the Columbia Circuit Court of Appeals sustained as against claims of due process being violated, saying:

"Even in normal times and as a matter of ordinary internal operation, the ability, integrity and loyalty of purely executive employees is exclusively for the executive branch of Government to determine, except in so far as the Congress has a constitutional voice in the matter. All such employees hold office at the pleasure of the appointing authority; again except only for statutory limitations. Never in our history, even under the terms of the Lloyd-Lafollette Act (infra, Note 8), has a Government employee been entitled as of right to the sort of hearing Miss Bailey demands in respect to dismissal from office. These well-established principles give perspective to the present problem." (182 Fed. 2d 51).

> "• • • It has been held repeatedly and consistently, that Government employ is not 'property' and that in this particular it is not a contract. We are unable to perceive how it could be held to be 'liberty'. Certainly it is not 'life'. So much that is clear would seem to dispose of the point. *In terms the due process clause does not apply to the holding of a government office.*" (182 Fed. 2d 57).

The Court, discussing the nature of government employment and the tenure applicable thereto, says that offices are held at the will of the appointing officer, not for life or for fixed terms, and concludes that a decision that removal from an office held at the will of a superior, requires due process of law, would put together two opposite and inherently conflicting ideas. The Court says:

> "• • • Due process of law is not applicable unless one is being deprived of something to which he has a right." (182 Fed. 2d 58).

In *Garner* v. *Board of Public Works,* 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317, the Court sustained as valid (1) a 1941 City Charter provision which forbade the obtaining or retaining of City employment by anyone who in the past five years has been, or now is, or may in the future be, guilty of advocating or belonging to a group advocating forceful overthrow of the Federal or State governments, and (2) a 1949 ordinance requiring of each City employee an oath that (in effect) he had not been, is not, and will not be such an advocate or member. The Court said:

> "We assume that under the Federal Constitution the Charter amendment is valid to the extent that it bars from the city's public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable

regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. Gerende v. Board of Supervisors of Elections, 341 U. S. 56, ante, 745, 71 S. Ct. 565 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, United Public Workers v. Mitchell, 330 U. S. 75, 102, 103, 91 L. ed. 754, 774, 775, 67 S. Ct. 556 (1947), and a state is not without power to do as much.

"The Charter amendment defined standards of eligibility for employees and specifically denied city employment to those persons who thereafter should not comply with these standards. While the amendment deprived no one of employment with or without trial, yet from its effective date it terminated any privilege to work for the city in the case of persons who thereafter engaged in the activity proscribed." (341 U. S. 720-721, 71 S. Ct. 913, 95 L. Ed. 1323).

In *Washington* v. *McGrath*, 84 Fed. Supp. 964 (Aff. 186 Fed. 2d 375, Aff. Mem. Op. 341 U. S. 923, 71 S. Ct. 795, 95 L. Ed. 1356), plaintiff postal employees sought a Federal District Court injunction against enforcement of executive orders for administration of employee loyalty program as unconstitutional. The District Court dismissed the complaint, saying:

"The other objections are to the effect that the Order does not accord due process to the employee before he is discharged. True, if the requirements of due process laid down by the Fifth Amendment of the Constitution of the United States were applicable to the discharge of a Government employee from the service, this order would not comply with those requirements. The type of hearing contemplated by the Order is not the type of hearing that is prescribed by the

due process clause. But the requirements of the due process clause apply only to judicial proceedings and to proceedings of a quasi-judicial nature. They do not apply to the employer-employee relationship as between the Government and its employees. An employer does not have to grant to his employee a formal trial, with all its pomp and circumstance, before discharging the employee. This applies equally as well to the United States as an employer." (84 Fed. Supp. 967).

The dismissal was sustained by the Columbia Circuit Court of Appeals (182 Fed. 2d 375) on the authority of *Bailey* v. *Richardson, supra,* and other cases (182 Fed. 2d 376).

Jeffries v. *Election Commission,* 294 Mich. 255 (cited and followed in the decision here appealed from) also subscribes to the doctrine that there is no property right in public office.

In *Norwalk Teachers' Assn.* v. *Board of Education* (dec'd 7-31-51), — Conn. —, 83 At. 2d 482 (C.C.H. Lab. Cas. No. 66543, 20 Lab. Cas. 80161) a bill for a declaratory judgment brought to establish the legality of various claimed "rights"—the Supreme Court of Errors denied any right of public employees to strike, saying:

"Under our system, the government is established by and run for all of the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. It should be the aim of every employee of the government to do his or her part to make it function as efficiently and economically as possible. The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle. It has been so regarded by the heads of the executive departments of the states and the nation. Most of the text writers refer to one or more of the following statements by three of our recent presidents. • • • 'There is no right to strike against

public safety by anybody, anywhere at anytime.' (Calvin Coolidge on the Boston Police strike). This same strike was characterized by President Wilson as 'an intolerable crime against civilization.' President Franklin D. Roosevelt said in a letter to the president of the National Federation of Federal Employees on August 16, 1937: 'Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees • • • (A) strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.' " (83 At. 2d 484).

"In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare." (83 At. 2d 384.)

(B) Appellants' "Rights" Are At Best Qualified and Subject to Regulation

If there could be found "life, liberty or property" in government employment, still it must be subject to regulation under the police power for the paramount public interest. (*United Public Workers* v. *Mitchell, Bailey* v. *Richardson, Garner* v. *Board of Public Works, Washington* v. *Mc-*

Grath, all supra). In *United Public Workers* v. *Mitchell, supra,* the Court said:

> "We have said that Congress may regulate the political conduct of government employees 'within reasonable limits', even though the regulation trenches to some extent upon unfettered political action. • • • When actions of civil servants in the judgment of Congress menace the integrity and competency of the service, legislation to forestall such danger and adequate to maintain its uesfulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional." (330 U. S. 102-103, 67 S. Ct. 571, 91 L. Ed. 74.)

There being no inherent constitutional "right" in public employment, and any "right" in such employment being, under the *Mitchell* case, *supra,* "subject to the elemental need for order without which the guarantees of civil rights to others would be mockery" and to the right of government "within reasonable limits" to regulate public employment and to "forestall such danger • • • when actions of civil servants menace the integrity and competency of the service • • •,"—the Hutchinson Act, justifiable for the same reasons, clearly does not violate due process.

In *International Union, U. A. W., A. F. of L., Local 232,* v. *Wisconsin Employment Relations Board* (1949), 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed 651, where the Court again conceded the right of a state legislature to mark the limits of tolerable industrial conflict in the public interest. The Court said:

> "The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental

right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the National Labor Relations Act." (336 U. S. 259, 69 S. Ct. 524, 93 L. Ed. 666.)

In *State* v. *Traffic Telephone Workers Federation*, 66 A. 2d 616 9 A. L. R. 2d 854, 2 N. J. 335, for similar reasons the Court sustained a New Jersey anti-strike statute as against charges that it violated the First and Fourteenth Amendments, saying:

"None of the provisions of the First or Fourteenth Amendments of the Federal Constitution is absolute. To quote Mr. Justice Holmes in the Hudson County Water Company v. McCarter, 209 U. S. 349, 355, 28 S. Ct. 529, 531, 52 L. Ed. 828, 832, (1908):

'All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.'

The same reasoning applies with even greater force to the broad, general constitutional guarantees asserted here. Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 (1934); Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. (Ad. Ops. 379) (1949); State Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, (E. & A. 1935).

The fact that the legislation here dealt with and the rights affected thereby involve matters arising out of labor disputes does not in anywise affect the proposition that all constitutional guarantees, like all other

rights, are subject to reasonable restraint where such restraint is deemed essential to the common good. • • •

The public utilities dealt with in the acts under review have long been held to be businesses affected with a public interest and therefore subject to special regulation by the State beyond that imposed on private industry generally. While such regulation of public utilities originally found its justification in the special franchises, often conferring monopolistic privileges, granted to them by the State, the regulation of utilities has long since found a broader justification in the necessities of our citizens for the services of these public utilities for health, safety and even life, where by reason of a strike, work stoppage or lockout the flow of the services of any of these essentials of community life is halted or impaired, the State has not only the right but a pressing duty to step in and prevent the continuance of such stoppage or impairment and to take appropriate measures to restore them. If instead of a stoppage or curtailment of essential services there is an imminent danger of their being halted or curtailed, the State has the right as well as the obligation of preventing the occurrence of such catastrophe. Cf. United States v. United Mine Workers, 330 U. S. 258, 67 S. Ct. 677, 97 L. Ed. 884 (1947).

• • • • • • •

Within the last few months, however, the Supreme Court of the United States, speaking through Mr. Justice Black, has twice reaffirmed the protection which the Federal Constitution affords to State statutes designed to protect the legitimate interests of the State in industrial disputes. Thus in Giboney v. Empire Storage & Ice Co., 1949, 336 U. S. 490, 69 S. Ct. 684, 690, 93 L. Ed. —, it is unanimously held that 'No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society.' Again in Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Iron and Metal

Company, 1949, 335 U. S. 525, 69 S. Ct. 251, 257, 260, 93 L. Ed. —, the Supreme Court in reviewing the course of decisions in this field over the last fifteen years held: 'This Court beginning at least as early as 1934, when the Nebbia case was decided, has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. See Nebbia v. New York, supra (291 U. S. 502, at 523, 524, 54 S. Ct. 505, at 509, 510, 78 L. Ed. 940, 948, 949, 89 A. L. R. 1469, and West Coast Hotel Co. v. Parrish, supra, 300 U. S. at 392, 395, 57 S. Ct. 578, 81 L. Ed. 703 (708-711), 108 A. L. R. 1330, and cases cited. Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.' " (2 N. J. 344-348, 66 At. 2d 620-622, 9 A. L. R. 2d 863-866.)

(C) Governmental Bodies Have Constitutional Power to Adopt Regulations Prescribing Qualifications for Getting or Holding Public Employment

It is well settled law that governmental bodies have the power by general regulation, to prescribe standards of qualifications and eligibility for obtaining or continuing public employment, and in so doing violate no constitutional provision. *United Public Workers* v. *Mitchell, Bailey* v. *Richardson, Garner* v. *Board of Public Works, Washington* v. *McGrath, Norwalk Teachers' Association* v. *Board of Education, State* v. *Traffic Telephone Workers Federation, all supra; Dworken* v. *Collopy* (Com. Pl. Oh.), 91 N. E. 2d

564; *Thorpe* v. *Trustees*, 6 N. J. 498, 79 A. 2d 462; *Thompson* v. *Wallin* (N.Y.), 95 N. E. 2d 806; *Weinstock* v. *Ladisky*, 98 N. Y. S. 2d 85; *Hirshman* v. *Los Angeles County* (Cal. App.), 231 Pac. 2d 140.

Such acts are justifiable under the inherent right of government to protect and perpetuate itself. *United Public Workers* v. *Mitchell; Garner* v. *Board of Public Works; Norwalk Teachers Association* v. *Board of Education; State* v. *Traffic Telephone Workers Federation; Dworken* v. *Collopy; Thorpe* v. *Board of Trustees; Hirshman* v. *Los Angeles County; Thompson* v. *Wallin, all supra.*

In *Heim* v. *McCall*, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206, the Court held the general power of a state over its municipalities extends to the regulation of the kind of laborers which may be employed in the construction of public works; that privileges and immunities of the citizens of the several states are not unconstitutionally abridged in an act providing that only United States citizens may be employed in the construction of public works by or for the State or municipality; that property is not thereby taken without due process of law, nor the equal protection of the laws thereby denied contrary to the Fourteenth Amendment.

In *Reetz* v. *Michigan*, 47 L. Ed. 563, 23 S. Ct. 390, 188 U. S. 505, the Court said:

> "Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.
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> • • • • • • •

But while the statute makes in terms no provision for a review of the proceedings of the board, yet it is not true that such proceedings are beyond investigation in the courts. In Metcalfe v. State Bd. of Registration, 123 Mich. 661, 82 N. W. 512, an application for mandamus to compel this board to register the petitioner was entertained, and, although the application was denied, yet the denial was based, not upon a want of jurisdiction in the court, but upon the merits.

It is further insisted that it is essential to a judicial or quasi-judicial proceedings that it should give a person accused or interested the benefit of a hearing, and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. * * * If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the state courts to what exent the action of the board had deprived him of his rights.

* * * * * * *

It is further insisted that having once engaged in the practice, and having been licensed so to do, he had a right to continue in such practice, and that this statute was in the nature of an *ex post facto* law. The case of Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002, 18 Sup. Ct. Rep. 573, is decisive upon this question. The statute does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon. As shown in Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231, there is no similarity between statutes like this and the proceedings which were adjudged void in Cummings v. Missouri, 4 Wall. 277, 18 L. Ed. 356, and Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366.

We fail to see anything in the statute which brings it within the inhibitions of the Federal Constitution, and

therefore the judgment of the Supreme Court of Michigan is affirmed."

(188 U. S. 508-510, 23 S. Ct. 392, 47 L. Ed. 566-567).

In *Local Union 876* v. *Labor Board,* 294 Mich. 629, the Michigan Supreme Court sustained as constitutional the former Michigan Labor Relations Act which then regulated labor relations of both publicly and privately owned utility employees, saying:

> "* * * A labor mediation statute concerns the welfare of the State as well as the welfare of the particular municipality. The right to pass general laws is still reserved to the legislature of the State, and consequently it is still competent for the State through the law-making body to enact measures pursuant to the police power or pursuant to other general powers inherent in the State and to require municipalities to observe the same." (294 Mich. 635-636.)

In *State Lodge F.O.P.* v. *Detroit,* 318 Mich. 182 (cert. den. 332 U. S. 818), the Lodge filed a bill to have declared null and void orders of the Detroit Police Commissioner forbidding policemen to join the Lodge and discharging two of plaintiffs' members for such membership. The bill was dismissed, the plaintiffs appealed, and the Court held that the record showed that the individual plaintiffs in joining the Lodge were guilty of insubordination; and that "the order" forbidding membership "is considered to be within the scope of authority granted under the Charter of the City of Detroit and cannot be said to be arbitrary and unreasonable. *The plaintiffs are not deprived of any constitutional rights"* (318 Mich. 189-190).

Appellants having no constitutional "property," or other rights, in their jobs, but qualified "rights" which are subject to State regulation—the Hutchinson Act, as a valid State regulation of public employment, so clearly does not violate

due process that the claim of such violation raises no substantial Federal constitutional question.

(D) "Due Process" Does Not, as Appellants Here Claim, Guarantee That Public Employees' Jobs and Job Rights Cannot Be Taken Away "Without Regard to the Desires of Their Employer."

Appellants' Jurisdictional Statement (p. 27) admits:

> "We are not here asserting a right to strike on the part of municipal employees. We are assuming that its prohibition is within the legislative powers of the State. But for the statute to *operate directly* upon the employees without regard to the desires of their employer, or much less, any decision of an impartial tribunal, and impose 'disciplinary action' and 'penalties' for striking seems to us to be arbitrary, and clearly in violation of the constitutional provisions invoked."

Appellants' claim here is that "due process" guarantees to each city employee the constitutional right to have his administrative supervisors alone decide as to whether his striking shall terminate or continue his employment; that the administrative superiors also have a similar constitutional right uncontrollable by legislation to make such decision, and that the employee has a constitutional right to a review thereof by an "impartial tribunal."

The due process clause makes no such fine distinction as to just which public officials must decide alone whether a public employee's striking ends or continues his employment. The Federal Constitution seems to leave this state matter to the States.

As a state matter, the Michigan Supreme Court in *Local Union 876* v. *Labor Board,* 294 Mich. 629, holds that the Legislature has the final word. This case sustained the validity of the Michigan Labor Mediation Act (176 P. A.

1939, Secs. 423.1-423.22a C.L. 1948), forbidding strikes in any publicly- or privately-owned utility without prior 30-day notice, a similar claim was rejected, i.e., that if the Act applied to any city-owned utility, the Act violated "home rule" provisions of the State Constitution. The Court held the Act applicable to city-owned utilities and valid, saying:

> "Defendants contend that the act cannot apply to a home rule city, and that this dispute is a matter of purely local concern over which the legislature has no control. In support of this position, many cases are cited which uphold the principle that the State through the legislature cannot control the affairs of the city or town which are purely local in character. * * *" (294 Mich. 634.)
>
> "The home rule provision of the Constitution does not deprive the legislature of its power to enact laws affecting municipalities operating under that provision except as to matters of purely local concern. A labor mediation statute concerns the welfare of the State as well as the welfare of the particular municipality. The right to pass general laws is still reserved to the legislature of the State, and consequently it is still competent for the State through the law-making body to enact measures pursuant to the police power or pursuant to other general powers inherent in the State and to require municipalities to observe the same." (294 Mich. 635-636.)

The decision vindicates the Legislature's police power—as against a local municipality's power, and thus also against the municipality's officials' power—to regulate the labor relations of the city's utilities.

Nothing in the due process clause of the Federal Constitution fixes unchangeably in the local administrative officials, rather than the State's Legislature, the sole power to decide whether the effect of a public employee striking is a termination, or a continuance, of his employment.

(E) The Act Took Away No "Right to Contract"

All City employees, including the Appellants, are appointed and employed, *not* under contract, but under the Civil Service provisions of the City Charter. All City employees are appointed and employed in the manner required by Title IV, Chapter II of the Detroit City Charter. The Charter makes no distinctions and no exceptions. While its Title IV, Chapter XIII, Sec. 3 says that the Street Railway Commission,

> "• • • shall *appoint, in accordance with the provisions of this charter relative to civil service,* such other officers, inspectors, accountants, attorneys and other agents and servants • • • as may be necessary • • •,"

this language of the Charter is identical with that used in twenty-one other places in the Charter to prescribe the method of employment of the staffs of twenty-one of the twenty-four other administrative departments of the City government, whereby the board or officer heading the department shall

> "• • • *appoint, subject to the provisions of this charter relative to civil service,* • • •."

This language appears twenty-one times in Title IV of the Charter; in Section 5 of each of Title IV's Chapters IV, V, VI, VII, IX, XI, XII, XV, XVII, XIX, XXV, XXVI, XXVII and XXVIII; in Section 3 of each of Title IV's Chapters VII, XVI and XX; in Section 8 of each of Title IV's Chapters XIV and XXII; and in Section 18 of Title IV's Chapter XXIV.

Thus the City's Street Railway Department employees are employed by the City in exactly the same manner as are the employees in every other City department except only

the Police Department, the Corporation Counsel's Office, and the Civil Service Commission itself.

This also clearly appears in the Charter's Civil Service Chapter, Title IV, Chapter II and especially in this Chapter II's Secs. 7(a), 9, 11-15 and 17.

Appellants' complaint that the Hutchinson Act interferes with a discharged striker's right to contract with the City for his services requires us to point out that Appellants themselves admit on page 6 of their Jurisdictional Statement that the last of their claimed "contracts" covered the period ending March 31, 1951, and, on page 7, that the strike was called on April 21, 1951. Thus the claimed "contracts" expired before the strike was called.

Appellants, admittedly having struck and then having been discharged under the Hutchinson Act, under civil service rules and under the common law, had no right, as against the City's wishes, to reemployment with the City. Certainly they had no Federal constitutional "contract rights" under "due process" to have re-employment at terms contrary either to the City's wishes or the Hutchinson Act, i. e., re-employment at more than pre-strike pay and with tenure.

(F) "Due Process" Does Not Require a "Judicial Hearing" on Loss of Any "Rights" in Public Employment

As already shown above—the case of *Bailey* v. *Richardson, Garner* v. *Board of Public Works* and *Washington* v. *McGrath, all supra,* all hold that public employment is not such a right that it must be terminated only by a "hearing", "judicial" or otherwise, in order to satisfy due process.

The same subject is discussed at more length hereinafter under the heading IV (C), Appellants Had No Constitutional Right to "Judicial Hearings" Before Removal.

(G) The Act Does Afford a "Judicial Hearing"

The fact is that, although rights to public employment are not such property rights as are protected by "due process" or require that a "judicial hearing" precede their loss, nevertheless Section 6 of the Hutchinson Act does accord such a hearing.

The consequences of striking which the Act imposes are not "imposed without a judicial trial." The Act's Section 6 (423.206 C. L. 1948) provides that,

> "• • • such person, upon request, shall be entitled, as hereinafter provided, to establish that he did not violate the provisions of this act • • •",

and requires (1) the filing within 10 days of the discharged employee's written request for hearing with the officer having the power of removal, (2) the commencement in ten days of a proceeding to determine whether he violated the Act "in accordance with the law and regulations appropriate to a proceeding to remove such public employee", and (3) a decision within 10 days. It permits the appeal, by petition to the Labor Mediation Board and hearing thereon of any decision unfavorable to the employee. From either hearing an appeal, by certiorari to the courts, remains unaffected by the Act. (*In re Fredericks*, 285 Mich. 262).

The first mentioned administrative hearing is sufficiently "judicial" to comply with the Constitution. *U. S.* v. *Reimer* (D. C. N. Y.) 22 Fed. Supp. 573; *People* v. *Camperlingo*, 69 Cal. App. 466, 231 Pac. 601. See also: *People* v. *Chapman*, 301 Mich. 584, 600-604. Being "in accordance with the law and regulations appropriate to a proceeding to remove such employee", it could not be more "judicial" and yet be constitutional. The Michigan Constitution forbids the judiciary to exercise administrative powers; and prevents the Legislature from authorizing or requiring the judiciary to conduct such hearings or to review them de novo (Art.

IV); *In Re Fredericks,* 285 Mich. 262, 267; *Goodfellow* v. *Detroit,* 312 Mich. 226, 231-232.

Just as the legislation seeking to provide for the continuance of functioning of government by keeping out of it employees who are disloyal and advocate the forcible overthrow of government was held valid in the above cases, so the Hutchinson Act, seeking to provide for the continuous functioning of the various branches of government by preventing interruptions thereof by strikes, is valid. The justifiable purpose of the legislation is not retrospectively punitive. It violates no constitutional or common law right of a public employee to strike and still retain his job; but, as a proper regulation of public employment, it is justifiable under the United States Supreme Court's recent decision in the case of *Garner* v. *Board of Public Works, supra,* 95 L. Ed. 1317, and the other above decisions which hold that such legislation does not violate "due process".

Appellants' claim that the Hutchinson Act violates due process is so completely without merit that it does not raise a substantial Federal question.

III

Appellants' Claim That the Hutchinson Act Denies Equal Protection of the Laws, Raises No Substantial Federal Constitutional Question.

Under the powers granted to cities by the Michigan Constitution's Article VIII, Section 23, and by the Michigan Home Rule Act (279 P. A. 1909, Sections 117.1-117.38 C. L. 1948) in its Sections 4d and 4f (Section 117.4d and 4f, C. L. 1948), and under the Detroit Charter's requirement (Title IV, Chapter XIII, Section 1) that: "The city shall at once * * * acquire * * * own and operate * * *" a trans-

portation system—in the instant matter the Michigan Supreme Court correctly found that:

> "'* * * the person's engaged in operating Detroit's street railway system are employees of the City of Detroit and, hence, are 'public employees.'"

The general, fundamental differences in treatment accorded by legislation to privately owned and publicly owned utilities has been approved by the United States Supreme Court in the case of *Springfield Gas and Electric Company* v. *City of Springfield*, 257 U. S. 66, 42 S. Ct. 24, 66 L. Ed. 131, wherein claim was made that such a distinction violated the constitutional prohibition relative to equal protection. Justice Holmes, answering that claim, said:

> "'The plaintiff's argument, shortly stated, is that, in selling electricity, the city stands like any other party engaged in a commercial enterprise. * * * But, we agree with the Supreme Court of the State that the difference between the two types of corporation warrants the different treatment they have received.'
>
> 'The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim. * * *.'" (257 U. S. 69, 42 S. Ct. 25, 66 L. Ed. 133).

In *Wolgamood* v. *Constantine*, 302 Mich. 384, the Court said:

> "We have recognized that a municipality's operation of a public utility, although it may be a proprietary activity, constitutes engaging in a public enterprise for a public purpose." (302 Mich. 394-395).

In labor legislation, this distinction between (a) those public employees working in publicly-owned utilities and (b) private employees working in privately-owned utilities, is frequently drawn and is sustained in the courts.

In *Creekmore* v. *Pub. Belt R. R. Comm. of New Orleans*, 134 Fed. 2d 576, cert. den. 320 U. S. 742, 88 L. Ed. 440, 64 S. Ct. 43, the Court held that the Fair Labor Standards Act (29 U. S. C. A. Sec. 201-219) did not apply to employees of a belt railroad owned and operated by the City of New Orleans. The Court called the exclusion—i. e., "any State or political subdivision of a State" from the definition of employer—"plain and unambiguous language and should be given effect as it is written" (134 Fed. 2d 577.) The claim that, since the City was acting in a purely proprietary capacity its employees should be within the Act, was denied, the Court saying:

> "In construing the Act the duty of the Court is to determine what employers and employees are within its coverage, not what employees 'should' have been covered, for the question of who 'should' be covered is a matter solely within the province of the legislative branch of the government. The language of Section 3(d) being plain, its meaning clear, the result reasonable, we see no reason for resorting to extraneous considerations in an effort to construe and give to such language another and different meaning.'
>
> • • • • • • •
>
> "The City of New Orleans being a political subdivision of the State of Louisiana, and the Public Belt Railroad Commission being one of its duly authorized, functioning departments, we think it clear that the employer-employee relationship between these employees and the City and its Commission falls squarely within the language of section 3(d) which in defining 'employer' excludes 'any State or political subdivision of a State.' " (134 Fed. 2d 577-578).

In *Abad* v. *Puerto Rico Com. Auth.*, 88 Fed. Supp. 34, the Court held that the terms of the Fair Labor Standards Act excluded from the Act's operation an Authority created to operate telephone and telegraph lines owned by the Puerto Rico Insular Government.

In *Wood* v. *Detroit*, 188 Mich. 547, the Court sustained, as not denying equal protection of the laws, a Workmen's Compensation Act which was compulsory upon cities and their employees, including the publicly-owned proprietary utilities of cities and the city employees engaged therein; although the Act gave to private utility corporations and their employees a right to elect to come under the Act or not.

In *Bross* v. *City of Detroit*, 262 Mich. 447, the Court held that a city fireman injured on duty while driving a fire truck which collided with a city-owned street car, could not sue the City at Common law as being "some person other than the employer" within the meaning of the Workmen's Compensation Act, which Act forbade any employee under the Act to sue his employer and restricted this employee's remedy against the employer to workmen's compensation.

Springfield v. *Closs*, 356 Mo. 1239, 206 S. W. 2d 539, holds that a law regulating labor relations of private employers' employees does not extend to employees of a city-owned bus line.

In the field of State legislation on labor relations this distinction is also justified by the courts for the reason (*inter alia*) that above mentioned Federal Labor legislation itself makes the distinction.

In *Nutter* v. *Santa Monica*, 74 Cal. App. 292, 168 Pac. 2d 741, the Court, denying to employees of Santa Monica's city-owned bus system the statutory right of collective bargaining given to employees of private employers, said:

> "The principle espoused by Section 923 is essentially the same as that fostered by the National Labor Rela-

> tions Act, 29 U. S. C. A. § 151 et seq., namely, the right of workmen to enjoy free collective bargaining over terms and conditions of employment. In adopting that act Congress did not recognize the existence of the right of collective bargaining in public employment and did not consider it necessary to adopt a national policy which would extend into the field of public employment. Section 2(2) of the act expressly excepts from the definition of the term 'employer' the United States and any state or political subdivision thereof.' " (74 Cal. App. 2d 298, 168 Pac. 2d 745).

The Federal labor laws distinguish between employees of privately-owned and employees of municipally-owned utilities (as in the Fair Labor Standards and Taft-Hartley Acts) in excluding from these laws municipally-owned utilities and their employees when excluding "the State or any political subdivision thereof" (*Creekmore* v. *Public Belt Railroad Commission of New Orleans*, and *Abad* v. *Puerto Rico Communications Authority, both supra*). In *Consolidated Edison Company* v. *Labor Board*, 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206, and *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 95 L. Ed. 364, 71 S. Ct. 359, the courts interpreted the Federal Law as being that the United States had legally and constitutionally occupied the field of labor relations of privately-owned utilities and excluded the States therefrom. The Federal courts, having sustained this distinction in the *Creekmore* and *Abad* cases, *supra*, the field of labor relations of privately-owned utilities is thus beyond State control and the field of municipally-owned utilities is thereby left to State control.

This distinction drawn by Congress and sustained by the United States Supreme Court, justifies state legislation which controls the labor relations of municipally-owned utilities but does not control those of privately-owned utilities. Such state control, when exercised by the Michigan

Legislature as in the Hutchinson Act, is constitutional and the Hutchinson Act does not thereby violate the Federal constitutional guarantee of equal protection of the laws.

The case of *Alabama St. Fed. of Labor* v. *McAdory*, 65 S. Ct. 1384, 325 U. S. 450, 89 L. Ed. 1725, is directly in point. There a claim that an Alabama statute regulating labor unions denied equal protection of the laws, was rejected. The Court said:

> "The contention that the Act denies equal protection because its provisions, or some of them, have not been extended to business corporations or associations or to labor organizations which are subject to the Railway Labor Act, 45 USCA § 151 et seq., 10 A FCA title 45, §§ 151 et seq. is without substance. The Constitution does not obligate a state to regulate or reform all types of associations and organizations, or none. It may begin with such as in its judgment most need regulation. Carroll v. Greenwish Ins. Co., 199 U. S. 401, 411, 50 L. Ed. 246, 250, 26 S. Ct. 66; Keokee Consol. Coke Co. v. Taylor, 234 U. S. 224, 227, 58 L. Ed. 1288, 1289, 34 S. Ct. 856; Bunting v. Oregon, 243 U. S. 426, 61 L. Ed. 830, 37 S. Ct. 435, Ann. Cas. 1919 A 1043; Sproles v. Binford, 286 U. S. 374, 396, 76 L. Ed. 1167, 1183, 52 S. Ct. 581, cf. West Coast Hotel Co. v. Parrish, 300 U. S. 379, 400, 81 L. Ed. 703, 713, 57 S. Ct. 578, 108 ALR 1330, and cases cited. And for this reason it may exclude from regulatory measures organizations which it has reason to believe are already appropriately regulated by either state or national legislation. Ziffrin, Inc. v. Reeves, 308 U. S. 132, 140, 84 L. Ed. 128, 136, 60 S. Ct. 163; cf. Union Bank & T. Co. v. Phelps, 288 U. S. 181, 188, 77 L. Ed. 687, 689, 53 S. Ct. 321, 83 ALR 1438.
>
> We would not have granted certiorari to review so unsubstantial a question, and all the other issues, as presented by the record now before us, are, for reasons which we have given, inappropriate for decision in a declaratory judgment proceeding. The writ of certiorari will therefore be dismissed." (89 L. Ed. 1740-1741, 325 U. S. 471-472, 65 S. Ct. 1394-1395).

Appellants' contention here, that the Hutchinson Act denies equal protection because it regulates the labor relations of publicly-owned utilities' employees but not those of employees of private utilities, is practically identical with the contention that the Alabama labor relations act denied equal protection because its provisions applicable to some labor unions "have not been extended to business corporations, associations or to labor organizations which are subject to the Railway Labor Act"—a contention which the United States Supreme Court said in that case was "without substance" and "unsubstantial". Just as the Court there said:

> "The Constitution does not oblige a state to regulate or reform all types of associaitons or organizations, or none. It may begin with such as in its judgment most need regulation."
>
> "And for this reason it may exclude from regulatory measures organizations which it has reason to believe are already appropriately regulated by either State or national legislation."

So here too the Constitution does not oblige Michigan "to regulate or reform all types of associations or employees or organizations in their labor relations, or none" and Michigan also "may begin with such as in its judgment most need regulation" and "may exclude from the regulatory measures" employees of privately-owned utilities, as being those "which it has reason to believe are already appropriately regulated by * * * national legislation", the Taft-Hartley Act.

What the United States Supreme Court has said of the claim of denial of equal protection in the *Alabama* case, *supra*, applies with even greater force to the similar claim advanced in the instant case, *i. e.*, it is "without substance" and "so insubstantial a question" as to not merit the granting of appeal.

IV

Appellants' Claim That the Hutchinson Act Is a Bill of Attainder Raises No Substantial Federal Constitutional Question.

(A) The Cases Cited by Appellants Are Not in Point Here

Appellants apply to the Hutchinson Act the epithet, Bill of Attainder, without citation of any pertinent judicial precedent so condemning any similar legislation. This is mere name calling.

Appellants cite 13 cases, all of which discuss, as bills of attainder, legislation utterly unlike the Hutchinson Act.

Thus 8 of their cited cases are "test oath" cases, which condemn legislation adopted after the Civil War solely to punish *retrospectively* persons suspected of previous acts of disloyalty to the Union, *acts committed before or during the Civil War and before the enactment of the legislation*—the legislative device being to require of such suspected citizens an oath of *prior* loyalty to the Union as a condition precedent to the exercise of various civil rights.

Of such "test oath" cases, and of *United States* v. *Lovett*, 66 S. Ct. 1073, 328 U. S. 303, 90 L. Ed. 1252 (also cited by Appellants in the instant case)—the United States Supreme Court said in *Garner* v. *Board of Public Works*, 95 L. Ed. 1317, 71 S. Ct. 909, 341 U. S. 716:

> "Bills of attainder are 'legislative acts . . . that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . .' United States v. Lovett, 328 U. S. 303, 315, 90 L. Ed. 1252, 1259, 66 S. Ct. 1073 (1946). Punishment is a prerequisite. See concurring opinion in United States v. Lovett, supra (328 U. S. at 318, 324, 90 L. Ed. 1261, 1264, 66 S. Ct. 1073). Whether legislative action cur-

tailing a privilege previously enjoyed amounts to punishment depends upon 'the circumstances attending and the causes of the deprivation.' Cummings v. Missouri (U. S.), 4 Wall. 277, 320, 18 L. Ed. 356, 362 (1867). We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.

Cummings v. Missouri (U. S.), 4 Wall. 277, 18 L. Ed. 356 (1867), and Ex Parte Garland (U. S.), 4 Wall. 333, 18 L. Ed. 366 (1867), the leading cases in this Court applying the federal constitutional prohibitions against bills of attainder, recognized that the guarantees against such legislation were not intended to preclude legislative definition of standards of qualification for public or professional employment. Carefully distinguishing an instance of legislative 'infliction of punishment' from the exercise of 'the power of Congress to prescribe qualifications,' the Court said in Garland's case: 'The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life.' (U. S.), 4 Wall. at 379, 380. See also Cummings v. Missouri, supra (U. S.), 4 Wall. at 318, 319, 18 L. Ed. 361, 362). This doctrine was reaffirmed in Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 S. Ct. 231 (1889), in which Mr. Justice Field, who had written the Cummings and Garland opinions, wrote for a unanimous Court upholding a statute elevating standards of qualification to practice medicine. And in Hawker v. New York, 170 U. S. 189, 42 L. Ed. 1002, 18 S. Ct. 573 (1898), the Court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony. Both Dent and Hawker distinguished the Cummings and Garland Cases as inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it." (341 U. S. 722-723, 95 L. Ed. 1323-1324, 71 S. Ct. 913-914).

Three remaining cases cited by Appellants also discuss attainder legislation utterly unlike the Hutchinson Act. *In re Yung Sing Hee*, 36 Fed. 437, 13 Sawy. 482, merely holds that a statute, which because of his race bars a citizens' re-entry into the country, is a bill of attainder—the *"punishment" being for the past "offense"* of having been born a Chinese *and not for something he may do in the future. McNealy* v. *Gregory*, 13 Fla. 417, holds only that the then Florida Constitution's voiding of all evidences of debts based on *previous* sales or purchases of slaves, *would be* a bill of attainder if its purpose were to punish the making, *prior to the enactment*, of such property the subject of sale. *Davis* v. *Berry*, 216 Fed. 413, holds that a statute requiring that criminals twice convicted of a felony undergo the operation of vasectomy, works the cruel and unusual punishment, violates the due process and, *in its inflicting of punishment for past offenses* by a legislative act without jury trial, is a bill of attainder.

In the last of these 13 cases cited by Appellants, *Gaines* v. *Buford*, 1 Dana. 481, 31 Ky. 313, the compact by which Kentucky became a State (contained in a Virginia statute and the Kentucky Constitution and approved by Congress) provided that "all rights and interests in lands" in Kentucky "shall remain valid and secure" and subsequent Kentucky legislation attempting to grant to good-faith occupants of Kentucky lands reimbursement for improvements if evicted by better title, had been held invalid as impairing the compact's obligations of contract. (*Green* v. *Biddle*, 21 U. S. 1, 8 Wheat. 1, 5 L. Ed. 547). Then a second Kentucky statute of the same sort, whose stated purpose was to counteract the United States Supreme Court's decision in the *Green* case, was passed. This second statute was declared unconstitutional in the *Gaines* case by only two Judges' opinions.

Judge Underwood held that the statute was unconstitutional as impairing the compact's obligations of contract but not as a bill of attainder. Judge Nicholas said that the statute "would seem to fall under this inhibition (bill of attainder) but then said:

> *"It is unnecessary to say whether either of the several clauses of the constitution referred to, would, singly, be sufficient to invalidate the act; and I do not wish, therefore, to be understood as saying that either of them would.* But that some, or all of them together, do invalidate it, I feel no doubt. They all tend to show that the legislature cannot in this mode, by any mere act of its own, divest a citizen of his property. They constitute together, in letter, spirit, and general scope of policy, a mass of obstacle to the divestiture of Gaines' title, in the manner contemplated, which to my mind is perfectly insurmountable, and which compels me to concur in saying the title is still in him, and that the act of 1824 is no obstruction to his recovery." (31 Ky. 332).

Such legislation has no similarity whatsoever to the Hutchinson Act, a statute *which does not operate retrospectively at all. It only operates prospectively and forbids public employees to strike in the future.* It makes such future striking a termination of employment, seniority rights and pension rights, subject to (1) the striker's right to a hearing on whether or not he struck and thereby possible reinstatement and (2) even if he is found to have struck, his possible re-employment, which can be at no more than his pre-strike pay for the next year and must be without tenure for two years. The Act cannot possibly operate upon any public employee except prospectively and then it does not operate unless and until he strikes. This is a far cry from "test oath" legislation, which *retrospectively* and without provision for hearing, convicts and punishes those of a class who are merely suspected of having, prior to the

enactment, committed the acts to be punished. The decisions condemning such legislation as attainder are (even as the United States Supreme Court said above): "inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it", and hence even less applicable where the disqualification is only on a future contingency and only for acts which the employee himself may choose to commit in the future.

(B) The Act Inflicts No "Punishment"

As already shown, appellant public employees have no constitutional property rights to public jobs. What rights they have to their employment and any appurtenant "rights" are subject to regulation, fixing qualifications for getting and holding public jobs, even though such regulations may terminate the employment and appurtenant rights. And although such termination need not be by "judicial hearing", the Hutchinson Act does afford such hearing.

Primarily the relationships between a State and its employees, including the legal responsibility, conditions and rights arising out of such public employment, are matters of State, rather than Federal, policy and control—to be determined by the State's common law decisions, and the State's statutes, so long as such law does not conflict with the Federal Constitution.

The Federal Constitution does not purport to grant to any State employee any right to retain his public employment while he is striking. Such "rights" could come only from the State's statute or common law, the interpretations of which by the State's highest tribunal are binding on the United States Supreme Court.

On this subject, the Michigan Supreme Court's decision here appealed from has interpreted the pertinent common law and the pertinent statute, in saying:

> "The Hutchinson Act provides certain limitations and regulations, but it 'inflicts' no punishment. It does not provide for fines or imprisonment, nor does it deprive a public employee, who has taken part in the strike, of any vested right.
>
> We know of no constitutional provision which gives an individual the right to be employed in governmental service or to continue therein." (332 Mich. 247).

The United States Supreme Court's recognition of the finality of a state's Supreme Court's interpretation of that state's common law and statutory law on a matter of so purely state, and not Federal, jurisdiction as is involved in the instant case, would accord with the Federal policy exemplified in Congress' exempting of "and state or political subdivision thereof" from the operation of such Federal labor legislation as the Fair Labor Standards Act and the Taft-Hartley Act. Thus Congress, by the Taft-Hartley Act, forbids private utility employers to fire an employee for striking; but Congress, in exempting entirely from this Act "any state or political subdivision thereof", leaves to each state the control over the responsibilites, conditions and rights of public employment, including employment in city-owned utilities.

Such recognition by the United States Supreme Court would also accord with the United States Constitution as interpreted by this Court in *Garner* v. *Los Angeles, supra,* wherein the Court held that the City of Los Angeles' charter amendment and the ordinance requiring loyalty oaths was not a bill of attainder, saying:

> "We assume that under the Federal Constitution the Charter amendment is valid to the extent that it bars from the city's public service persons who, subse-

quent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States. Cf. Gerende v. Board of Supervisors of Elections, 341 U. S. 56, ante, 745, 71 S. Ct. 565 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was reasonably designed to protect the integrity and competency of the service. This Court has held that Congress may reasonably restrict the political activity of federal civil service employees for such a purpose, United Public Workers v. Mitchell, 330 U. S. 75, 102, 103, 91 L. Ed. 754, 774, 775, 67 S. Ct. 556 (1947), and a State is not without power to do as much." (95 L. Ed. 1323, 71 S. Ct. 913, 341 U. S. 720-721).

The very fact that under the Federal Constitution states and cities can regulate reasonably public employment negatives any claim that the state or city employee has a Federal constitutional right to violate such regulation and can, contrary to such regulation, get or retain a public job. It especially negatives any claim to a Federal constitutional right to hold a public job until removed by "judicial hearing".

While many states, by civil service or veterans' preference legislation, give their public employees certain rights of tenure, no provision of the Federal Constitution requires that any State enact such legislation at all, nor that it enact such legislation with provision for "judicial hearings" restricting removals to those affected by such hearings. Nor does the Federal Constitution require that any public employee, if discharged, be given any re-employment at all, much less that he be given re-employment on his own terms.

The Federal Constitution leaves the matter of such regulations entirely to the states—so that state legislation on them, like the Hutchinson Act, does not thereby impose such punishment, either criminal or by deprivation of "rights", as to constitute attainder.

(C) Appellants Had No Constitutional Right to "Judicial Hearings" Before Removal

Nor does such legislation deprive any employee of any Federal constitutional right to a "judicial hearing".

The *Garner* case, *supra*, holds that public employment is not an absolute right; that it is a privilege which can be regulated by statute so that the employee's violation of such statutory regulation may itself, without judicial hearing, terminate his employment; and that if such violation of regulation without previous judicial hearing terminate employment—the regulation is not thereby a bill of attainder. In this the *Garner* case merely conforms to the general rule that, where a statute which regulates the exercise of a privilege requires that violation itself of such regulation terminate the privilege, the statutory requiring of termination does not make the statute unconstitutional.

To the same effect are the cases of *Bailey* v. *Richardson* and *Washington* v. *McGrath*, both *supra*.

This rule has been followed by our Michigan Supreme Court. *Johnson* v. *Commr. of Agriculture*, 314 Mich. 548, reviews at length the decisions sustaining licensing laws which provide for revocation of license upon violation of the regulating law. The only real difference between the *Johnson* case and the one at bar in this respect is in the order of procedure. In the *Johnson* case, the Commissioner of Agriculture *himself institutes the hearing before himself* on the revocation of the privilege; while under the Hutchinson Act, the public officials must first make an *ex parte* finding that the employee has struck and then the

employee can institute steps leading to two hearings, the first before these public officials, the second before the Mediation Board, and, if desired, finally certiorari appeals from these hearings to the Courts.

The statutory grant to a board of registration in medicine of the power to decide whether an applicant for registration had been legally registered under a prior statute, without provision in terms for a review of such board's decision, does not render the act obnoxious to the Federal Constitution as being without due process, as long as the action complained of may be reviewed by the courts. *Reetz* v. *Michigan, supra,* 23 S. Ct. 390, 188 U. S. 505, 47 L. Ed. 563.

(D) The Hutchinson Act Affords A "Judicial Hearing"

Although at common law, a public employee who struck had no right to a "judicial hearing" before discharge, or after it, the fact is that the Act itself in Section 6, *does* afford each employee a hearing which is as "judicial" as the Michigan Constitution's Article IV (prohibiting the judiciary to exercise executive or administrative powers), permits, as the Michigan Supreme Court said in the Opinion here appealed from:

> "A basic reason urged by cross-appellants in challenging the constitutionality of the Hutchinson Act is that it contains no provision for judicial review of rights asserted by a discharged public employee, and hence they are deprived of due process of law. However, by section 6 of the act provision is made for such an employee to have a hearing before the officer or body having power to remove such employee, and for a right of review of a holding adverse to such employee before the labor mediation board. We have held that like provisions are quasi-judicial and afford to the discharged employee compliance with his constitu-

tional rights. In *In re Fredericks,* 285 Mich. 262, a headnote reads:

> 'A decision of a municipal civil service commission upon a hearing to remove an employee of a fire department for cause, not being the result of judicial action, but being at most a quasi-judicial act of an administrative tribunal, is not subject to review by the courts on appeal and an attempt by the legislature to create a right of appeal would be unconstitutional as an endeavor to foist nonjudicial functions upon the courts.'" (332 Mich. 246).

The fact that such hearing follows, rather than precedes, discharge does not invalidate the Act. This is the usual order in which, under tenure statutes, all separations from public service take place; first discharge, then application for hearing, then hearing and then decision on the hearing. The Federal Constitution does not condemn this order or require any different order.

There is no Federal constitutional requirement that such hearing be by persons who have had utterly no connection with the original discharge. The Michigan Legislature was not legally bound to presume that the public officials who had supervised the public employee before he struck would be partial. It could lawfully provide that the hearing on discharge be held by those officials who probably were most familiar with the basic facts of the strike.

The fact that on the second hearing provided the Labor Mediation Board can only effect a voluntary settlement, rather than make a final binding decision, does not void the Act. This hearing is just an additional protection to the employee discharged for striking. The Federal Constitution requires no such additional hearing at all nor does it require that it be before a board having final authority in the matter.

From the decision on either such hearing or both the right of appeal to the courts by certiorari still exists and is not barred, limited or affected by the Hutchinson Act. *In re Fredericks*, 285 Mich. 682.

The Hutchinson Act is even less open to attack as a bill of attainder than was the legislation which the United States Supreme Court sustained as not a bill of attainder in the *Garner* case, *supra*. There is one distinction: In the *Garner* case the employee, in order to remain on the job, was required to take some positive action (oath); but under the Hutchinson Act the employee, to remain on the job, is not required to take any positive action at all, he remains on the job until he himself takes the positive action of striking. In this respect the Hutchinson Act is even less "automatic", even less self-executing, and therefore even less open to condemnation as a bill of attainder, than that sustained in the *Garner* case, as not being a bill of attainder.

The Hutchinson Act is so obviously not a bill of attainder that the contrary claim is utterly without substance.

V

Conclusion

We respectfully submit that none of Appellants' three claims of unconstitutionality of the Hutchinson Act raises a substantial Federal constitutional question, and that all three are so unsubstantial that Appellee's Motion to Dismiss or Affirm should be granted.

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OCTOBER 1951 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26, GEORGE KNOPPE, THOMAS WOOF, JOHN B. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as Board Members of said Division 26, JOHN DOE and RICHARD ROE, whose persons are well known, but whose names are unknown,

Defendants-Appellants,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MORKLE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees,

and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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QUESTIONS INVOLVED

1. Is there a substantial question under the due process of law clause of the 14th Amendment?

2. Is there a substantial question under the equal protection of the laws clause of the 14th Amendment?

3. Is there a substantial question under Constitution, Article I, Section 10, proscribing bills of attainder?

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IN THE

Supreme Court of the United States

OCTOBER 1951 TERM

No.....

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Intervening Defendants-Appellees

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

I.

STATEMENT OF FACTS

Appellees have filed a statement opposing jurisdiction, and a motion to dismiss or affirm. This is our reply, under Rules 7(3) and 12(3).

II.

ISSUES

The issues presented are whether or not there are substantial questions under the three constitutional provisions invoked (1) the due process of law clause of the 14th Amendment, (2) the equal protection of the laws clause of the same Amendment and (3) Art. 1, Sec. 10 proscribing Bills of Attainder.

III.

PRELIMINARY STATEMENT

It seems to us better to present an analysis of the State Statute in question, rather than to reply in a necessarily somewhat disconnected manner to appellees' statement, point for point.

It seems to us that the application of the three constitutional objections to the State Statute raised in this appeal becomes apparent when there is an understanding of the significance of the challenged statute in relation to the situation to which it was applied in this case.

IV.

ANALYSIS OF THE HUTCHINSON ACT

The Hutchinson Act in section 2 *prohibits strikes* by public employees, as the Act describes public employees.

The Act takes no effect at all, and is wholly dormant until a strike occurs. Its operation on any individual employee is wholly dependent upon the existence of the one single fact, namely that he engaged in a strike, as that term is defined in sections 1 and 6.

It is of primary significance that no provision is made in the act for any *finding* of the existence of this pivotal fact. No method for its determination is outlined or even hinted in the Act. It is left entirely to assumption, and whose assumption is not clear—but in the present case, the municipality through the Board of Commissioners of the Street Railway system, assumed the authority, and having assumed to make such "finding", applied the Act (R. 74-75, 387-395).

It seems to us at once apparent that this "finding" was nothing more than taking cognizance by the city of the fact that a strike occurred. Actually the "finding" of the board went so far as to apply to individual employees, and exclude others (R. 74-75, 398-401). It was in no sense such finding as could bind the individual employee, nor is it a finding required to be made by any provision in the Act, but is wholly and completely something which the municipal authorities assumed to take upon themselves to do.

The effects of the Act on the individual employee (Sec. 4) is contingent upon the fact that he "violates"—that is to say, he engaged in a strike, as that term is defined in the Act. The Board of Commissioners then, by their "finding", without hearing, without notice, and being composed of persons who were adversary to the employees in the labor controversy, arbitrarily made individual employees amenable to the law, "notwithstanding the provisions of any other law", and excluded others.

It is a significant fact that the Commission did not apply their "finding" to a very considerable number of the employees (R. 74-75, 398-401).

Under the same section 4, the employee when he "violates the provisions of this act shall *thereby* abandon and

terminate his appointment or employment", and various other penalties follow.

This provision is vastly different from any other legislative act which has come to our attention, as providing for the discharge of public employees. Any such law that we have seen *does not operate directly* on the employee in such manner that he "thereby" loses his job and incurs penalties for doing a prohibited act, but rather these provisions merely make the designated misdeeds ground for his discharge by his employer—such as does the Hatch Act. See *United Public Workers v. Mitchell,* 330 U. S. 75, 67 S. Ct. 556, 91 Law Ed. 754. And so were the Ordinance and Charter provisions in Los Angeles having to do with non-Communist affidavits. See *Garner v. Board of Public Works,* 341 U. S. 716, 71 S. Ct. 909; 95 Law Ed. 1317. The same distinction appears in *Bailey v. Richardson,* 182 Fed. (2) 46—all of these cases having been cited by appellees.

This is a substantial difference, for most cities have an established procedure providing for a hearing, judicial in nature, before an employee may be finally discharged, and subsequent recourse to the courts to review the same—as does the city of Detroit, and to the benefits of which these employees were entitled under the Civil Service provisions of the Charter.

But even without reference to any such provisions, the Hutchinson Act is shockingly arbitrary, for not only does it compel job severance "notwithstanding any other provision of law" by direct operation *but it inflicts additional penalties,* to which consideration we shall shortly come.

When the employee strikes there is "thereby" a complete job severance. He is no longer an employee of the city.

In addition to the sufficient language of section 4 above quoted, section 5 makes this doubly clear by saying that he may "subsequent to such violation be *appointed or re-appointed, employed or re-employed.*" It does not say that he may be "reinstated" but conclusively implies that he is no longer an employee. This is well understood, for counsel for the city bitterly contested use of the word "reinstate" in the decree of the trial court (R. 373-378).

When he is alleged to have struck therefore, there are two courses open to the individual employee (except of course that he may abandon the whole thing and go elsewhere, which in no wise lessens the impact of the Act upon him);

First, under Section 5, he may apply to the city for a job. If he gets it, under that section his "compensation" (which includes fringe benefits for the word "wages" is not used) "shall in no event exceed that received by him immediately prior to the time of such violation", and it "shall not be increased until after the expiration of one year", and for two years he shall be on "probation" "without tenure" "at the *pleasure* of the appointing officer or body."

Thus, immediately upon the assumed participation in a strike by the individual employee—which fact is in no competent way established—the employee is placed in a class separate from all others, in that he cannot offer his services in the one place most natural for him to offer them, on a footing equal to all others.

In *Raney v. County Commissioners,* 170 Md. 183, 197, 183 A. 548, 554, it is said:

> "While it is true that no particular person has any right to governmental employment, yet all persons have a right to apply on equal terms for such employment, and when terms are prescribed as con-

ditions precedent to such employment, they must be reasonable, and have some relation to qualification for the service."

Raney v. County Commissioners, 170, Maryland 183, 197, 183 At. 548, 554.

In *Cummings v. Missouri,* 4 Wall. 277, 321-2, 18 Law Ed. 356, 362, it is said:

"The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among those are life, liberty and the pursuit of happiness; and that *in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone,* and that in the protection of all these rights, *all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no otherwise defined."* (Italics ours.)

Cummings v. Missouri, 4 Wall. 277, 18 Law Ed. 362.

A substantial right is thus violated by the Hutchinson Act immediately when a strike is asserted, though not found to exist in any competent manner. The employee is immediately placed in a class different from all his fellows, and subjected to burdens and penalties.

We submit that this is a substantial right protected by both the equal protection of the laws clause, and the due process of laws clause of the Fourteenth Amendment.

Second, the employee who has asserted to have struck may go with his hat in his hand to his *employer,* to his adversary in the labor controversy, and *there* seek to "establish that he did not violate the provisions of the Act", under Section 6.

One needs but to project his presence to such scene to be convinced of its conclusive partiality in the light of the events of this controversy. We have in our jurisdictional statement pointed out that this hearing is not judicial in character because of a lack of impartiality of the tribunal.

Besides, there is no reason why this burden should be placed on any individual employee. Why is any individual employee obliged to undertake the burden of proving that he did not violate the act? *There is nothing to establish that he did so.* It is only *assumed* that he did so. But the burden is placed on him by Section 6, "notwithstanding the provisions of any other law."

In other words, under Section 6 he is assumed to be guilty and subject to all the penalties of the Act, and is forced, before a partial tribunal, to free himself of the presumption.

He is, under the terms of the Act, subjected to the burdens of overcoming what the Act treats as an *adjudication* —though there is no shadow of such in reality—that he has violated the Act.

It adds nothing that he may, under the statute, obtain a review by the State Mediation Board, where he is subject to the same burdens.

Essentially, there is nothing in existence to place the burden upon him.

It is important in this regard to keep in mind that his job is not all that is at stake. There are other issues. He must free himself from the imposition of penalties—from being placed in a class where he cannot sell his services to his former employer on a footing equal to that of others.

This burden cannot be foisted upon him without a competent adjudication of guilt.

This Act is frankly penal in nature. Its operation effects much more than mere job severance. Immediately upon the assumption by the Municipality that an employee has violated the act, the city is bound by the Act to treat him as a violator, and hence the employee is immediately subject to the penalties. He is not only out of a job, but he is placed within a proscribed class who cannot sell their services again to the city on equal terms with others (Sec. 6) without first sustaining the burden of lifting the presumption of guilt in the non-judicial proceedings provided in Section 5.

It seems to us that the Act is analogous to a criminal statute. For example, the murder statute in Michigan (C. L. 29, Sec. 16708, M. S. A. 25.548) provides that First Degree Murder "shall be punished by solitary confinement at hard labor in the state prison for life". If under this statute, the law enforcement officers take cognizance of a murder (making a "finding"), and proceed to execute the terms of the punishment provided in the statute, without judicial hearing or any other proceeding, judicial in nature, we have an exact analogy to the proceedings actually had in this case under the Act, *and required by the Act.* The distinctions are only in degree, not in kind.

Appellees' argument that the striking employees "discharge themselves" is but a sophistry. Under this reasoning in the above analogy, appellees would say that the alleged culprit confined himself in the state prison for life.

Nor is the act one merely providing qualifications for holding or obtaining public employment, nor regulatory thereof. It is rather one making the act of striking a penal offense, and punishing the same without any shadow of due process of law, but solely on the assumption of the municipal authorities that the particular public employee is guilty.

In *Cummings v. Missouri*, 4 Wall. 277, 319; 18 Law Ed. 356, 361-2, this court said:

> "Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean 'any natural endowment or any acquirement which fits a person for a place, office or employment, or enables him to sustain any character, with success.' It is evident from the nature of the pursuits, and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and profession." • • •
>
> • • • • •
>
> "It is manifest upon the simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the existence of the profession and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings, or the trusts with which they were charged. It was required in order to reach the person not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the calling, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties who had committed them of some of the rights and privileges of the citizen."
>
> *Cummings v. Missouri*, 4 Wall. 277 (319),18 Law Ed. 356, (361-2).

And the arguments of appellees that the Act provides no "penalties" is a mere shutting of their eyes. The Legis-

lature that adopted the Act believed that they were providing "penalties", and "disciplinary action", and plainly used the terms in the Act, *and provided them.*

With this analysis of the Act as related to the facts presented, we think the application of the three constitutional provisions invoked becomes apparent.

We shall discuss each briefly.

A. THERE IS A SUBSTANTIAL QUESTION UNDER THE DUE PROCESS OF LAW CLAUSE OF THE FOURTEENTH AMENDMENT.

The position of appellees that no public employee has a right to public employment—no "property"—is of no consequence in the light of the above analysis.

It is apparent that a public employee, or anyone else, has a right, unless competently adjudged guilty of some offense for which such penalty has been lawfully imposed, to apply for or retain public employment on a footing equal to all of his fellows.

This right is denied by the Hutchinson Act on the mere assumption (in this case) of his employer that he participated in a strike.

Whether this is "property" or "liberty" is of no significance. It is a substantial right, and we think one protected by the due process of law clause.

True, the employee can avoid the penalties under the provisions of Sec. 5 if he can establish before his employer, in a wholly partial proceeding that he did not violate the act.

But this means that he can avoid one burden placed upon him by the act only by assuming another.

So a burden is placed upon him irrevocably by the Act, based on a mere assumption.

And in any event, without any charge brought, and without hearing or determination, he is immediately and arbitrarily subjected to penalties by the terms of the Act, upon the mere assumption that he has engaged in a strike.

We think the due process of law clause clearly applies.

B. THERE IS A SUBSTANTIAL QUESTION UNDER THE EQUAL PROTECTION OF THE LAWS CLAUSE OF THE FOURTEENTH AMENDMENT.

1. In our jurisdictional statement we urge that there is no sufficient distinction between employees of a municipally operated transportation system, and a privately operated one, to justify placing the former in a separate class, and imposing burdens upon them by legislative act, to which the others are not subjected.

We therein cite a considerable number of authorities to the effect that municipally owned proprietary enterprises must be governed by the same rules applicable to those owned privately.

Appellees in their statement cite decisions that they claim hold otherwise.

If this is true, the direct diversity among the decisions would seem to indicate a substantial question.

We think the truth is that no decision holds, and we think none could hold either that the distinction is sound for all purposes, or that it is not sound any for any purpose at all.

We think that the true rule is that it is sound for some purposes, but not for others.

Our own situation must be examined and analyzed to determine the question.

This makes it a substantial question.

We wish to point out two things having a direct bearing on this question:

First, the Detroit Public Transportation System is by charter provision intensely proprietary, and as remote from the governmental powers of the city as it could be made. See Charter, Title IV, Chapter XIII. The Board or Commission has control, subject to the approval of the Mayor, "as fully and completely as if said board represented private owners". Section 13. The system performs no service to the city as such in any way. No taxpayers' money contributes any part of its income, and its sole income is from passengers' fares—except certain incidental income of a very minor nature, such as from streetcar advertising. The system pays taxes on its property to the municipality. Sec. 4. And while for certain kinds of bonds the city may and has pledged its credit (Section 9-12) the fares are required to be such that "the entire cost of said Street Railway System shall be paid eventually out of the earnings thereof." Sec. 4.

Second, we are here dealing with municipal powers—not the powers of any other unit of government. Municipal corporations have dual powers—governmental and proprietary. This is evidenced by a large number of decisions, but see *Kalamazoo v. Circuit Judge*, 200 Mich. 46 for a fairly full exposition. In contrast, in the Federal Government, in the operation of a business, such powers are incident to some governmental power or function, for that political unit has no proprietary powers separate from governmental powers—such powers being coextensive with government. *U. S. v. Maurice*, 26 Fed. Cas. No. 15747,

2 Brock. 96; *Dikes v. Miller*, 25 Tex. Supp. 281, 78 Am. D. 571. And see *Ashwander v. Tenn. Val. Auth.*, 297 U. S. 288, 56 S. Ct. 466, 80 L. Ed. 688. This difference is important particularly in analysis of the various authorities cited, for the Federal Government exercises nothing but governmental powers, proprietary powers being incident thereto (though of course the federal government does exercise large proprietary powers), while cities exercise proprietary powers which are no part of governmental powers.

We are concerned here with a classification of employees of a city in a strictly proprietary enterprise.

Any analysis must we think begin with these fundamental concepts. Many decisions seemingly applicable, are not so at all.

2. Appellees cite decisions supporting the fairly well understood principle that the constitution does not require the state to embrace everything within a statute that it might reach.

As we understand this rule, it is not necessary to the validity of a state statute that it embrace every class within the law that it might reach, so long as it deals equally with any given class. We quite fully uunderstand that a statute is not invand because it has not gone as far as it might have gone.

But we think equal protection requires equal treatment of all within a class. It is our position that employees of public transportation systems (vehicle operators) are in a natural class, and all must be treated equally; there is no basis for selecting from this natural class merely those employed by municipalities, and that such classification is not germane to the object sought, and rests on no sufficient distinction.

Obviously a strike in a publicly owned and operated utility of a proprietary nature is fraught with no more evil consequences than in a similar public utility privately owned. No governmental activities are interfered with where no governmental activities are involved. A business run by a city, not for municipal purposes, is no different from any other business.

In *Woodward v. Pere Marquette Railway Co.*, 312 Mich. 67, the syllabus says:

> "Statute requiring railroad companies to furnish employees whose duties relate to the immediate transportation of passengers or their baggage with 'a uniform hat, or cap and distinguishing badge' is unconstitutional as class legislation, competing public carriers not being required by any statute to do likewise."
>
> *Woodward v. Pere Marquette Railway*, 312 Mich. 67.

This ruling is very evidently based on the principle that there was no sufficient distinction for segregating the affected employees from the class into which they naturally belonged.

The primary principle of equal protection of the laws is that all members of a class must be treated equally by the law. It is our position that all similar employees of public utilities comprise a class entitled to equality of application of law. If a sub-class is to be carved out of this class, such sub-classification must be upon some reasonable basis.

The Michigan Supreme Court has stated the principle in *Haynes v. Lapeer Circuit Judge*, 201 Mich. 138, (141-142):

"It is elementary that legislation which, in carrying out a public purpose for the common good, is limited by reasonable and justifiable differentiation to a distinct type or class of persons is not for that reason unconstitutional because class legislation, if germane to the object of the enactment and made uniform in its operation upon all persons of the class to which it naturally applies; *but if it fails to include and affect alike all persons of the same class, and extends immunities or privileges to one portion and denies them to others of like kind, by unreasonable or arbitrary sub-classification, it comes within the constitutional prohibition against class legislation.*" (Italics ours.)

Haynes v. Lapeer Circuit Judge, 201 Mich. 138, (141-142).

The distinction between the present case and such decisions as *Alabama State Federation of Labor v. McAdory,* 325 U. S. 450, 65 S. Ct. 1384, 89 Law Ed. 1725, cited by appellees, is clear. In that case complaint was made that the statutory provisions involved "had not been extended to business corporations, associations or labor organizations which are subject to the Railway Labor Act"—(325 U. S. p. 371-2). That is a totally different complaint from the one in our own case. That case stands for the accepted principle that "the constitution does not obligate a state to regulate or reform all types of associations and organizations, or none". That principle in no way impinges upon the principle which we assert, that a state statute must apply equally to all members of a class, and if a sub-class is to be carved out of such class, it must be on some sound distinction.

We think a substantial question is presented on the issue of equal protection of the laws.

C. A SUBSTANTIAL ISSUE IS PRESENTED ON THE QUESTION OF BILL OF ATTAINDER.

1. We think that we have done something more than to merely apply an epithet to the Hutchinson Act. We cite a considerable number of decisions of this court and of other courts, in our jurisdictional statement dealing with bills of attainder. It is quite true, that many of these decisions on the facts are not similar to the case at bar. Many are test oath cases and deal with other factual situations, that most similar to the case at bar being doubtless *U. S. v. Lovett,* 328 U. S. 303, 90 Law Ed. 1252.

In that case, Congress had attached a rider to a deficiency appropriation act, which rider provided in effect that none of the money so appropriated should be used to pay the salaries of Lovett and others, the reason behind it being that congress was in some doubt as to their loyalty. It was provided however that the provisions of the rider would not be effective if within a certain time they were appointed to any position by the President, with proper confirmation. This court held that such constituted a bill of attainder.

The mere fact that no decision presents itself on all fours with the facts would scarcely excuse us from citing decisions of this and other courts dealing with applicable principles.

This we think we did.

Bills of attainder have of course been relatively rare in this country for reasons apparent to anyone who has but rudimentary knowledge of American history. Few indeed occur prior to civil war times, and post civil war times. This period was fruitful of a considerable number of decisions having to do with expurgatory oaths, two most commonly cited being *Cummings v. Missouri,* 4 Wall. 323, 18

Law Ed. 356, and *Ex Parte Garland*, 4 Wall. 333, 18 Law Ed. 366, both decided the same day by this court. The Cummings case is a particularly well considered case, and the principles which it announces are applicable to the case at bar.

The definition of a bill of attainder has been set out in our jurisdictional statement as taken from *Lovett v. United States, supra.* We think the Hutchinson Act falls clearly into this definition.

Certain principles as we say, are clearly established by the decisions which we cite in our jurisdictional statement. Among these are the principles that bills of attainder, in a constitutional sense include both those enactments which were historically such, and also those which provide punishment of lesser degree, and which were called bills of pains and penalties. The principle is also firmly established that it is not necessary that the act designate any particular person, but it is sufficient if it designates a class of ascertained or easily ascertainable persons. It is held also that a bill of attainder need not necessarily be *ex post facto*, but may operate prospectively.

The Michigan Supreme Court contented itself by holding that the Hutchinson Act was not a bill of attainder because it lacked the element of punishment, in that it deprived no one of any "vested" rights, and provided for no fines or imprisonment.

Appellees take the same line of argument.

But it is perfectly clear under *Cummings v. Missouri*, 4 Wall. 323, 18 Law Ed. 356, cited and quoted in our jurisdictional statement, that deprivation of a vested right or imprisonment or fine, is not necessary to punishment as that term is understood with reference to bills of attainder.

The appellees rely very strongly on *Garner v. Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 Law Ed. 1317. That decision has been referred to hereinabove and deals with charter and ordinance provisions of the city of Los Angeles, requiring the filing of oaths or affidavits of public employees having to do with their affiliation with communist or other subversive organizations. If appellees had compelled us to cite decisions only on all fours with the facts, they are certainly not doing what they would compel us to do. In any event, the Garner case is easily distinguishable, and has no application whatsoever to the case at bar, because this court distinctly held that the Charter and Ordinance Provisions there involved merely provided qualifications for public employment, and was therefore not a bill of attainder.

It is entirely likely that the constitutional provisions proscribing bills of attainder in the protections which it affords, overlaps other constitutional protections, and this matter has been discussed in several of the decisions cited. We have not felt that this is the place to go into detailed analysis of a large number of decisions.

On the necessity for trial of a judicial nature before penalties may be imposed, we have hereinbefore devoted some effort. We think it is a requirement not only under Article I, Section 10, proscribing bills of attainder, but it is also a requirement of the due process of law clause of the 14th amendment. We think it is constitutionally required under all circumstances before penalties may be imposed.

We think a substantial question is presented on the issue of bill of attainder.

D. THE QUESTIONS ARE SUBSTANTIAL WITH REFERENCE TO THE "BREADTH" OF APPLICATION OF ANY DECISION OF THIS COURT.

We indicated in our jurisdictional statement that several states have already adopted acts similar to the Hutchinson Act. The following laws similar to the Hutchinson Act are on the books of several states:

Minnesota, Ch. 146, Laws of 1951, effective 3-24-51
New York, Ch. 391, Laws of 1947, effective 3-27-47
Ohio, S. 261, effective 9-20-47
Pennsylvania H. 826; effective 9-1-47

We have no statistics as to the number of employees and political units amenable to the Acts, but manifestly any decision of this Court as to the constitutionality of the Act will be of wide application.

The matter is substantial in that sense certainly.

V.

RELIEF SOUGHT

We ask that appellees' motion to dismiss or affirm be denied, and that the court note jurisdiction.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

United States of America

IN THE

Supreme Court of the United States

OCTOBER 1952 TERM

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Defendants-Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees and Respondents,

and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Respondents

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND TO NOTE JURISDICTION

EDWARD N. BARNARD,
Counsel for Petitioners,
905-11 Dime Building,
Detroit 26, Michigan.

United States of America

IN THE

Supreme Court of the United States

OCTOBER 1952 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26, GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as Board Members of said Division 26,

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Intervening Defendants-Appellees and Respondents

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND TO NOTE JURISDICTION

PETITIONERS pray that this Court grant rehearing of its order of October 13, 1952 granting appellees' motion

to dismiss and dismissing appellants' appeal, and that on rehearing this Court note jurisdiction.

REASONS FOR GRANTING REHEARING AND NOTING JURISDICTION

1. We shall briefly summarize, at the beginning, the reasons why we think a rehearing should be granted, and that this Court should note jurisdiction of the appeal:

The Hutchinson Act[1] marks the appearance of a new type of labor statute. It differs radically from any statute we have seen dealing with employment and discharge of public employees. Its provisions are, on its face, such as to immediately raise questions of its constitutionality. They are, as we claim, arbitrary in terminology and application, and highly oppressive of labor. Being a statute novel in type, and oppressive and arbitrary, and on its face of questionable validity, it is provocative of labor troubles and of litigation, instead of peace between employer and employee. Despite these things, adoption of the statute is spreading rapidly, and it now exists in five states. Need for determination of its validity is therefore widespread. No opinion of any appellate court exists as to its validity, save that appealed from here. This Court is the only court that can finally settle the issue, since it is the final arbiter of the validity of a state law under the provisions of the United States Constitution.

We shall briefly explain the things above summarized:

(a) The Hutchinson Act marks the appearance in the field of labor legislation of a new type of statute.

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[1] This is the popular name of the Michigan statute challenged in this appeal—Act 336 P. A. 1947, C. L. '48, Sec. 423.201 *et seq.*, M. S. A. 17.455 (1) *et seq.* Ready reference may be had to the jurisdictional statement, Appendix D, p. 52 *et seq.*

It is novel in several respects.

It purports to operate directly on the individual employee who is assumed to have struck, and he "thereby" loses his job. Section 2. Any statute we have seen providing for discharge of public employees, defines the alleged misdeed and fixes the penalty, generally leaving it to an administrative agency to impose the penalty, on notice and hearing. Such is the Hatch Act (See *United Public Workers v. Mitchell*, 330 U. S. 75, 67 S. Ct. 566, 91 L. Ed. 745), and so are the charter and ordinance provisions in Los Angeles involving the filing of non-communist affdavits (See *Garner v. Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317). And see also *Bailey v. Richardson*, 182 F. 2d 46. The operation of the Loyalty Program, and its insistence on fair hearings prior to final job severance, is of course familiar to this Court, and is illustrative.

The Hutchinson Act though it becomes operative only on the single fact that an employee has struck, does not even provide who is to determine this pivotal fact, nor by what procedures it is to be found. The act is dormant until this fact appears, yet no provision at all is made for its determination.

In the case at bar, the appellee city, through the governing commission of the Street Railway System, assumed the authority to make this determination. It did not merely take cognizance of the existence of a strike, as an administrative act, but discriminated between employees and out of 3800 affected employees found that about 250 had not struck, and that the remainder had done so.[2]

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[2] By copies of the minutes of meetings of the Commission, introduced as exhibits on pre-trial proceedings, it appears that the Commission obtained the advice of the Corporation Counsel, and proceeded to make a finding that a strike existed, and sent notices to the employees that their employment was terminated and compensation had ceased. But to about 250, who were found not to have struck, no notice was sent. (R. 74-75, 387-395, 398-401.)

The acts differs from other acts also in applying actual penalties or punishments for striking. After losing his job in the manner explained, of the employee is rehired, he is punished by being on probation for two years, and cannot have a raise in wages for one year. Section 5. The act is penal and punitive.

These things, as well as other things hereinafter mentioned, mark the act as a new type of labor statute. Its novelty is not restricted to merely these features, but we think many features of the act are new to labor legislation, in application if not in substance, some of which are discussed hereinafter in other aspects.

(b) That these things are highly arbitrary, and oppressive of labor cannot be doubted. The arbitrariness and oppressiveness of the act are indicated by the fact that its provisions are enjoined to take effect, "notwithstanding any other provisions of law," three times repeated in the statute. Sections 4, 5, and 6. This effectually wipes out any possibility of Civil Service provisions, to which most public employees are entitled, and as those in this case were.

The act strictly enjoins the public employing agency in most arbitrary terms to observe all the provisions of the act. Section 3.

The Michigan Supreme Court in its opinion spoke only of "limitations and regulations," and avoided the terms "punishment" and "penalties." But the title to the act itself speaks of "disciplinary action," and "penalties." And the act surely provides them.

(c) Being novel in type, oppressive, and arbitrary, the act at once on its face suggests that it is violative of constitutional provisions. It not only performs the legislative function of defining the misdeed and penalty, but assumes also the judicial function of applying the penalty. Doubts

as to its validity arise immediately upon its reading. The strike in the instant cause arose after opinion by counsel for the employees that the act is unconstitutional.

We shall not reiterate arguments heretofore made, save to say that we raise question of due process of law, equal protection of the laws, and bill of attainder.

(d) The essential point is that being oppressive, arbitrary, and a new type of labor statute, and uncertain as to its validity, it is provocative of labor unrest and of litigation. Limitations of the record prevent us from reviewing any litigation that has resulted. But the Court can properly consider that the situation is such as might provoke litigation and dissatisfaction.

It is our considered belief that if the validity of this act is not determined in this appeal, it will inevitably reach this Court from some other source.

(e) The act is most arbitrary in providing for punishment and penalties without the usual safeguards of fair hearing and notice.

When the employee is severed from his job under Section 4, as previously pointed out, he can be re-employed, but only subject to the penalties provided in Section 5. Under Section 7, on petition signed by a majority, the State Mediation Board can act. But the individual has no such right—nor does his Union.

Under Section 6, however, he can petition for a hearing before the employer, to show that he did not violate the act.

But it is obvious that in so doing he is taking on this burden only to avoid the others.

The inescapable feature therefore is that *the moment the individual employee is severed from his job upon assumption of a fact that may or may not exist, by some unauthorized person, he is by the statute placed in a class where he cannot apply for public employment on the same terms as all others.*

He is therefore inevitably punished by the operation of the statute, with no notice and no hearing.

Very likely, no one has a legal right to public employment. *But everyone has a right to apply for public employment on terms equal to all others.*

In *Raney v. County Commission* (1936) 170 Md. 183, 197, 183 A. 548, 554, a state statute provided that legal notices of a county must be published in a publication circulated within the county and which publication had actually set type within the county for four years preceding. A citizen taxpayer sought to enjoin payment to a publisher who had his printing done outside the county. The lower court sustained a demurrer to the bill, and the appellate court affirmed, saying:

> "Appellants suggest that the Legislature has the uncontrolled power to determine who shall and who shall not do the state's work, and that *no person or class of persons are entitled as of right to such work.* But if it be conceded as it must be, that the power of the Legislature to determine through what agencies and means the work of the government is to be carried on and administered is necessarily broad and comprehensive, nevertheless that power is not unlimited, for it, as well as all other branches of the government, is restrained by the Constitution. So *while it is true that no particular person has any right to governmental employment, yet all persons have a right to apply on equal terms for such employment,* and when terms are prescribed as con-

> ditions precedent to such employment, they must be reasonable, and such as have some relation to qualification for the service." (Italics ours.)
>
> *Raney v. County Commissioners* (1936), 183 Atl. 548 (554).

And in *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed. 356, the court said:

> "The theory on which our political institutions rest is * * *all honors, all positions, are alike open to everyone * * *".
>
> *Cummings v. Missouri*, 4 Wall. 277, 18 Law Ed. 356.

Thus a burden or penalty is inevitably visited upon an individual employee the instant some unauthorized person, without notice or hearing, finds that he has struck.

This is a most arbitrary, oppressive, and novel feature of the state statute in question, and certainly gives rise to substantial questions of its constitutionality.

(f) Any decision of this Court would obviously be of wide application. Many thousands of public employees and their employers, public agencies, in five states[3] are in a situation where the validity of the statute should be ascertained. We believe that the need for such decision may be properly described as acute.

(g) This Court is the only court that can set the controversy at rest. Issues as to the constitutionality of the act under the United States Constitution are inevitably raised not only upon any attempted application of the statute, but on a mere reading. Of these issues this Court is the final arbiter.

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[3] Besides Michigan, Minnesota, ch. 146, Laws of 1951; New York, ch. 391, Laws of 1947; Ohio, S. 261 (1947); Pennsylvania, H. 862 (1947).

No other opinion of any appellate court now exists, save in the decision appealed from. The wisdom and public benefit resulting from an authoritative decision now we hope will be apparent to the Court.

CONCLUSION

For the reasons set forth above, and in the jurisdictional statement, and in the brief filed in opposition to the appellee's motion to dismiss or affirm,[4] it is respectfully urged that rehearing be granted, and that upon such rehearing, jurisdiction be noted.

Respectfully submitted,

EDWARD N. BARNARD,
Counsel for Petitioners,
905-11 Dime Building,
Detroit 26, Michigan.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EDWARD N. BARNARD,
Counsel for Petitioner.

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[4] Intervening defendants and appellees, C. I. O. Unions, filed a brief in support of the appeal, too late for consideration we think. It contains concise and enlightening comment on the issue of substantial question.

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Intervening Defendants-Appellees and Petitioner

PETITION OF INTERVENING DEFENDANT AND APPELLEE U.A.W.-C.I.O. FOR REHEARING OF ORDER GRANTING MOTION TO DISMISS APPEAL

NICHOLAS J. ROTHE,
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3610 Cadillac Tower,
Detroit 26, Michigan.

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Intervening Defendants-Appellees and Petitioner

PETITION OF INTERVENING DEFENDANT AND APPELLEE U.A.W.-C.I.O. FOR REHEARING OF ORDER GRANTING MOTION TO DISMISS APPEAL

Petitioner, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America,

CIO, prays that this Court grant rehearing of its Order of October 13, 1952, dismissing the appeal in the above-entitled cause and that this Court deny the motion to dismiss or affirm, and note jurisdiction.

REASONS FOR GRANTING REHEARING AND DENYING THE MOTION TO DISMISS OR AFFIRM

1. At the time of this Court's consideration of plaintiff-appellee City of Detroit's motion to dismiss or affirm, and at the time this Court's Order was entered granting dismissal, the brief of this intervening defendant and appellee in support of jurisdiction and in opposition to the motion to dismiss or affirm was not before the Court. We believe the Court records will show that the brief reached the Court immediately thereafter. That brief, filed under Rule 7 (3) of the Supreme Court Rules, supported the position of the appellant Division 26, and asserted that there was indeed a very serious and substantial Federal question involved, militating toward its consideration by this Court. The position of the petitioner is, together with that of numerous other labor organizations not here parties of record, one of tremendous concern over the consequences of the Michigan Supreme Court decision upholding the "Hutchinson Act". Our brief has been prompted by this concern, and moreover, by the feeling of the petitioner that the statute implies widespread consequences of great breadth and significance which will affect not merely the Division 26 labor union, but the petitioner and other labor unions of *non*-public employees.

We deeply feel that there is a truly substantial question here involved, which may have been brought more fully to the cognizance of the Court had the brief of this petitioner been before it.

2. The above-described October 13, 1952, Order of the Court, states that Mr. Justice Black and Mr. Justice Douglas dissent and "Mr. Justice Burton is of the opinion that probable jurisdiction should be noted." We respectfully submit that where such a large number of Justices of this Court, namely three, have concurred in the arguments of the parties hereto that jurisdiction should be noted and that there is in fact a substantial Federal question, the Court should re-explore the matter in question.

3. A great many labor unions of the country, including this petitioner, representing non-public employees are grievously concerned over the implications of the Hutchinson Act and of the decision upholding it. These labor organizations feel that inferences and conclusions which may be validly drawn from the opinion and decision of the Michigan Supreme Court upholding the Act will likely lead to further improper and unwarranted decisions of law, and the upholding of other legislation equally or more harsh, arbitrary and unconstitutional—decisions and legislation which will adversely affect *all* labor organizations, and their members, and not merely organizations of *public* employees.

Moreover, *we are specifically authorized by the national Congress of Industrial Organizations (C.I.O.) to state that it concurs in all that is stated in this petition, and supports the petition, and it respectfully urges that this Court reconsider and rehear the motion to dismiss, and that it deny said motion.*

In view of the indicated breadth and import of the Michigan Supreme Court decision upholding the Hutchinson Act and in view of the probable adverse effects, as far as all labor organizations in all areas of endeavor are concerned, we most respectfully, though vigorously, urge the Court to reconsider its Order of Dismissal.

4. This petition is filed pursuant to Rule 33 of Rules of the United States Supreme Court.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Court grant rehearing of its Order of October 13, 1952, dismissing the appeal in the above-entitled cause, and that this Court deny the motion to dismiss or affirm, and note jurisdiction.

Respectfully submitted,

NICHOLAS J. ROTHE,
Attorney for Intervening Defendant, Appellee and Petitioner, U.A.W.-C.I.O.,
3610 Cadillac Tower,
Detroit 26, Michigan.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

NICHOLAS J. ROTHE
Attorney for Intervening Defendant, Appellee and Petitioner, U.A.W.-C.I.O.

PROOF OF SERVICE

Alex Arene, being duly sworn, deposes and says that as an employee of Interstate Brief and Record Company, 642 Beaubien Street, Detroit 26, Michigan, he has charge of mailing and delivering briefs for use in the United States Supreme Court, that on October 22, 1952 he served two copies each of this petition to Hon. Paul T. Dwyer, 301 City Hall, Detroit, Michigan, Ralph Goldsmith, 1637 National Bank Building, Detroit, Michigan and Edward N. Barnard, 905 Dime Building, Detroit, Michigan respectively, by serving same duly addressed to each of the parties.

He also served six copies upon Hon. Edmund E. Shepherd, Solicitor General of the State of Michigan by placing same in the United States Post Office at Detroit, Michigan, postage prepaid, duly addressed.

(Sgd.) Alex Arene.

Subscribed and sworn to before me this 22nd day of October, A. D. 1952.

(Sgd.) Bernice Mitten,

Notary Public, Wayne County, Michigan.
My commission expires September 23, 1956.

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RESPONSE OF CITY OF DETROIT, PLAINTIFF AND APPELLEE, TO THE RESPECTIVE PETITIONS FOR REHEARING BY DIVISION 26, DEFENDANT AND APPELLANT, AND UAW-CIO, INTERVENING DEFENDANT

(For List of Attorneys see inside front cover)

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FACTS

The City of Detroit's employees working on its transit system having struck, the City filed its bill against their Union, Division 26, for injunctive relief and *inter alia* a declaration of rights as to the constitutionality of Michigan's Hutchinson Act (Act 336 P. A. 1947). The UAW-CIO intervened as defendant. The decree holding the Act constitutional was appealed to the Michigan Supreme Court, which also held it constitutional (*Detroit v. Division 26*, 332 Mich. 237), from which decision Division 26 alone petitioned the United States Supreme Court for an allowance of appeal. On May 27, 1952 this was granted.

On June 14, 1952 (within the 15 days allowed by rule) the City filed its "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" with proofs of service on all original parties.

By October 13, 1952, 121 days later, only Division 26 had filed a brief in opposition to the City's "Statement and Motion", which brief the City did not answer.

On October 13, 1952, the United States Supreme Court entered the following order:

> "*PER CURIAM:* The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas dissent. Mr. Justice Burton is of the opinion that probable jurisdiction should be noted."

On the following day, the 122nd day after the City's statement and motion had been served on all original parties, the City received from the UAW-CIO a two page brief citing no new law and perfunctorily stating its position that the Act was unconstitutional. Thus prior to the above

decision the UAW-CIO had failed to comply with the United States Supreme Court's rule as to the filing of briefs and cannot now, as a matter of right at least, complain of the above decision by the United States Supreme Court.

Division 26 and the UAW-CIO have each filed a petition for rehearing.

We here answer both petitions and the two page brief.

ARGUMENT

The petitions for rehearing raise only the one point already decided:

> Is there a substantial Federal constitutional question in appellants' claims that the Hutchinson Act violates "due process", "equal protection" and "attainder"?

Appellants have admitted that public employees have no right to strike, and that the State can by legislation prohibit such strikes, and that their three claims of unconstitutionality of the Hutchinson Act were confined to its operation on public employees who have struck. Appellants said:

> "We are not here asserting a right to strike on the part of municipal employees. We are assuming that its prohibition is within the legislative powers of the State. But for the statute to *operate directly* upon the employees, without regard to the desires of their employer, or much less, any decision of an impartial tribunal, and impose 'disciplinary action' and 'penalties' for striking seems to us arbitrary, and clearly in violation of the constitutional provisions invoked."
>
> (Appellants' typed Jurisdictional Statement, pages 24-25.)

The petitions for rehearing contain no new *legal* argument, nor even a new citation with the exception of one case cited in Division 26's petition, *Raney v. County Commission*, 170 Md. 183, 197, 183 A. 548, 554, which states the same principle of law as that in *Garner v. Board of Public Works*, 314 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317.

The *Garner Case* held constitutional Los Angeles' legislation denying public employment to advocates of the forceful overthrow of the Federal or State governments and requiring each city employee to make oath that he was not an advocate, failing which his employment ended and he was disqualified for *reemployment*. It authorized *reinstatement* of those *not* guilty; but did not provide for *reemployment* of anyone who *was* guilty. The majority of the Court applied the same test as in the *Raney Case* and thus found the legislation to be "a reasonable regulation to protect the municipal service by establishing employment qualifications of loyalty to the State and the United States." (341 U. S. 721-722, 95 L. Ed. 1323, 71 S. Ct. 913.)

The dissenting opinions did not repudiate the prospective application of this standard, nor hint that similar legislation if purely prospective, such as the Hutchinson Act is, would be unconstitutional.

So that in the instant case—where admittedly public employees have no right to strike and a State, desirous of insuring the continuity of the public service, can by legislation prohibit its employees from striking—the State can, under both *Raney and Garner*, set up prospectively in this legislation such requirements for public employment as are reasonable and have some relationship to qualification for public service.

The particular part of the Hutchinson Act, to which Division 26 applies the *Raney Case*, is its Section 5, which

does not at all affect those who are *wrongfully* discharged for striking and can by hearing obtain *reinstatement* under Section 6, but affects only those *rightfully* discharged for striking and authorizes their *reemployment* without loss of seniority or pension rights.

Division 26's application of the Raney case to Section 5 ignores the plain fact that, under the *Garner Case*, the Hutchinson Act need not for validity contain any provision at all authorizing *reemployment* of the Act's violators. It could, as did the legislation sustained in *the Garner Case*, leave them ineligible for *reemployment*.

But the Hutchinson Act does not forbid, or even fail to authorize, *reemployment* of its violator. It leaves him in every way just as eligible for and as likely to obtain employment as anyone else and in these respects on identical footing with anyone else seeking public employment.

The Hutchinson Act merely operates to authorize the rehiring of the striker and thereafter impose three conditions on his work:

(1) for a year he can have no pay over his pre-strike pay;

(2) for two years he can have no tenure; and

(3) his pension and seniority rights are restored.

While Division 26 denounces all this as "punishment", it is much less punitive than the legislative bar to its violator's *reemployment* which the *Garner Case* sustained as not punitive at all, but as being reasonable and related to qualifications for public employment.

The Hutchinson Act's requirements are even more reasonable and have an even closer relationship to qualifications for public employment. The Michigan Legislature,

to insure the continuance of public business, sought to prevent strikes by public employees by (a) forbidding such strikes, (b) forbidding public officials to authorize, approve or consent to such strikes, and (c) requiring the discharge of both sorts of violators. And then—to insure in advance and before any public employee struck that he would not believe he could get a pay raise by striking and that no public official could circumvent the Act by giving a striker a pay raise for which he might strike—the Legislature declared in Section 5 that no such forbidden strike or forbidden collusion could possibly produce such a pay raise within a year. Thus, the Legislature sought to prevent strikes by, in advance of any strike, making it impossible for such a strike to be successful.

Without the Act's so forbidding the success of a strike, with no restrictions in the Act on the wages of reemployed strikers, the Act would have, in terms, prohibited strikes, but would have, in fact, permitted strikers to achieve the ends for which they violated the prohibition and thus would have nullified the prohibition.

Similarly Section 5's withholding for two years from the rehired striker the benefits of tenure is but a reasonable legislative means to insure to the public that the returned striker would in that period conduct himself in accordance with all rules, regulations and laws, since he could not rely on any aid or protection of tenure laws in doing otherwise. In this respect the rehired striker is, like any other new employee, subjected for a time to probation.

If the Los Angeles' legislation's disqualifying its violator from *reemployment*, is not "punitive" but reasonable and valid—certainly the Hutchinson Act's qualifying its violator for *reemployment* with restoration of pension and seniority rights and under conditions designed to protect

the public against misconduct by the rehired striker, is also reasonable and valid. If legislation forbidding its violators' *reemployment* be constitutional— how then can legislation far more generous in its authorizing its violators' *reemployment* with restoration of pension and seniority privileges, invade the violator's "rights"?

If the offender has no constitutional right at all to *reemployment*, can not the State, even if willing to take another chance on him under such conditions of work as would make him less likely to offend again, reemploy him under any such conditions of his work? *Must* the State always hold out by law to him the legal possibility that by striking for a pay raise in violation of the law he can get such a pay raise? Does the Federal Constitution place each State in such a legal strait jacket that it can protect itself only by (1) barring striking public employees from *reemployment;* or (2) authorizing their *reemployment* only under conditions conducive to the success of their strike? Does the Federal Constitution forbid each State to take any other means of protecting itself? Must the State, if it rehires a striker, immediately give him the protection of tenure laws so that if he soon offends again, the resumption and continuance of public business must await his exhausting all of the procedures of tenure laws up to final decision of the appellate courts?

The "due process", "equal protection" or "attainder" clauses do not guarantee that any public employee not barred from *reemployment* shall have such double "right" and double opportunity to hinder and shut down the local or state governments.

At best constitutional "rights" in respect to public employment are subject to such State regulation as the Legislature, in the exercise of its police powers and of its power

to legislate for the State's self-preservation, may reasonably deem likely to insure the continued functioning of public business. The exercise of these powers for this purpose—by the statutory subjecting of a rehired striker's work to regulatory conditions which make this purpose, the continuous performance of public business, more likely —is not unconstitutional.

Division 26's statement, that the Act's title's mention of "disciplinary action" and "penalties" prevents the Act from being regulatory, ignores the fact that the "penalties" refer only to the Act's Section 8 which applies *only* to "any person not a public employee who incites a public employee to strike", upon whom, after judicial trial and due conviction, fine and imprisonment may be imposed under Section 8. This Section 8 is not here claimed to be unconstitutional.

The remainders of both petitions consist only of criticisms of the Act which, although speciously advanced as legal arguments, have nothing at all to do with either the Act's legal meaning or its constitutionality. All of them are merely sociological and political arguments as to the advisability of this legislation.

The petition by the UAW-CIO presents no new citation or argument of law, but only the vague charge that the United States Supreme Court's previous dismissal of the instant appeal, unless reversed, may, by some unspecified and unknown process, "lead to further improper and unwarranted decisions of law, and the upholding of other legislation equally or more harsh, arbitrary and unconstitutional—decisions and legislation which will adversely affect *all* labor organizations and their members, and not merely organizations of *public* employees."

In this case nothing could be clearer from the Act itself, and from the briefs, records and decisions in this case, than the fact that the Hutchinson Act refers exclusively to *public* employees and *not* to *private* employees at all. (In fact, Division 26 complains that the Act violates "equal protection" because it does *not* refer to *private* employees).

If hereafter in any other litigation any lawyer were to assert that the Act applied to *private* employees, his assertion would be most obviously erroneous and the United States Supreme Court need have no fear that any court would follow such a claim. The here sustained decision of the Michigan Supreme Court is too clear to admit hereafter of any such erroneous interpretation.

In the UAW-CIO's petition the entirely italicized statement that the petition is authorized, supported and concurred in by the national organization of the CIO raises no point of law.

We most respectfully submit to the United States Supreme Court that neither petition raises a new question of law or advances a new legal argument, and that this Court should not here burden itself again with the reexamination of claims so unsubstantial as those the appellants in the instant case have advanced.

They all have already been fully argued, briefed and considered and have been found by a clear majority of the Court to be too unsubstantial to warrant hearing.

CONCLUSION

The petitions for rehearing should be denied.

Respectfully submitted,

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WALTER E. VASHAK,
BERT R. SOGGE,
HELEN W. MILLER,
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Dated: October 30, 1952.

[redacted]

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United States of America

IN THE

Supreme Court of the United States

OCTOBER 1952 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26, GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as Board Members of said Division 26,

Defendants-Appellants,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees,

and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Petitioner

OBJECTIONS OF THE CITY OF DETROIT, PLAINTIFF AND APPELLEE, TO THE FILING BY THE AMERICAN FEDERATION OF LABOR AND BY THE CONGRESS OF INDUSTRIAL ORGANIZATIONS OF BRIEFS AMICI CURIAE ON PETITIONS FOR REHEARING

In this cause Division 26, defendant and appellant, having been allowed an appeal to the United States Supreme Court, City of Detroit, plaintiff and appellee, filed its "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm" and the Court on October 13, 1952, entered the following order:

> "*PER CURIAM:* The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas dissent. Mr. Justice Burton is of the opinion that probable jurisdiction should be noted."

Thereafter Division 26, defendant and appellant, and the UAW-CIO, intervening defendant, filed petitions for rehearing to which the City filed its "Response". Since then the Congress of Industrial Organizations and the American Federation of Labor have filed motions for permission to file briefs *amici curiae* to which motions City of Detroit has not consented. Its reasons therefor and its objections to the motions follow:

I.

Neither motion complies with the requirement of United States Supreme Court Rule 27(9)(c) that it "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case".

II.

Neither motion sets forth any facts or questions of law or legal arguments not already considered and decided by the Court and neither one holds forth to the Court the likelihood of anything whatsoever except the mere repetition of arguments already presented to the Court and found by the Court to contain no substantial Federal constitutional question. In fact this is admitted in the very

beginning of the brief *amicus curiae* which the American Federation of Labor has prematurely filed by attaching it to its motion. This brief starts with the words:

> "The points, authorities and arguments set forth by Appellants are concurred in by the American Federation of Labor. Special emphasis will be placed hereinafter on one of Appellants' grounds of appeal"

and proceeds merely to repeat an argument which Division 26 has already advanced to the Court and the Court has already rejected, namely: that the Hutchinson Act denies equal protection of the laws because it applies to publicly owned, and not to privately owned, utilities. The proposed brief then cites three United States Supreme Court decisions *sustaining* State legislation as not denying "equal protection."

We agree with these three decisions. They sustain our position as to the law of "equal protection" and its application.

It is true that the laws there involved were not labor laws but statutes (1) forbidding only unnaturalized aliens to possess shotguns, (2) subjecting only railroad companies owning land on which a noxious weed grows to penalties in favor of adjoining owners, and (3) restricting the hours of operation of wash houses in only a certain area of San Francisco.

More closely in point with the instant case is this Court's more recent decision of *Alabama State Federation of Labor v. McAdory*, 65 S. Ct. 1384, 325 U. S. 450, 89 L. Ed. 1725, in which (as we pointed out in our "Statement Opposing Jurisdiction") an Alabama labor statute applicable to some but not to other labor unions was sustained as affording "equal protection".

III.

Already all grounds of appeal in this case have by briefs of Division 26 and the City been thoroughly argued, have been duly considered by the Court and have been found by the Court to contain no substantial Federal constitutional question. They have been rejected and the appeal dismissed. The petitions for rehearing now before the Court present no new grounds of appeal, nor new argument of law, nor new facts and they should be denied without briefs *amici curiae* especially since neither motion to file such a brief raises a new ground of appeal, argument of law or fact and neither motion complies with Rule 27(9)(c) requiring that it "set forth facts or questions of law that have been, or reasons for believing that they will not adequately be, presented by the parties".

CONCLUSION

We respectfully submit that the motions to file briefs *amici curiae* should be denied.

Respectfully submitted,

PAUL T. DWYER,
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JAMES H. LEE,
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Business Address:
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Dated: November 3, 1952.

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United States of America
IN THE
Supreme Court of the United States

OCTOBER 1942 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK SLECTYPE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually, and as Sergeant-at-Arms of said Division 26, GEORGE KNOFFE, THOMAS WOOF, JOHN R. ADAMS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS HAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as the Members of said Division 26,

Petitioners-Appellees,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, ODDNEY [illegible]TER, and HERMAN L. MOZELL, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees,

and

UNITED DUR[illegible]ERS LOCAL 3[illegible] C. I. O. Affiliated with Governmental Coordinating Committee C. I. O., an unincorporated voluntary association, and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Petitioners

MOTION OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON PETITION FOR REHEARING OF ORDER OF DISMISSAL

ARTHUR J. GOLDBERG,
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of Industrial Organizations,
718 Jackson Place, N.W.,

United States of America

IN THE

Supreme Court of the United States

OCTOBER 1952 TERM

No. 207

DIVISION 26, OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, PATRICK McINTYRE, individually, and as President of said Division 26, ROBERT HOLLOWAY, individually and as Vice-President of said Division 26, WALTER STANLEY, individually and as Business Agent of Division 26, JOHN FRANCIS, individually and as Secretary-Treasurer of said Division 26, IVOR M. MULLINS, individually and as Sergeant-at-Arms of said Division 26, GEORGE KNOPPE, THOMAS WOOF, JOHN R. GLABAS, RALPH HOLMAN, CORNELIUS O'SULLIVAN, GEORGE STOCKS, THOMAS NAGLE, ALBERT RILEY, RUSSELL GOYER, JOSEPH SILVERTHORN, LEROY McKESSON, DAVID LATIMER, individually and as Board Members of said Division 26,

Defendants-Appellants,

vs.

CITY OF DETROIT, a Municipal Corporation by and through FRED P. SISSON, RODNEY BAXTER, and HERMAN L. MOEKLE, as and constituting the Board of Street Railway Commissioners of the City of Detroit,

Plaintiffs-Appellees,

and

UNITED DSR EMPLOYEES LOCAL 312 C. I. O. Affiliated with Government Civic Employees Organizing Committee C. I. O., an unincorporated voluntary association and INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O., an unincorporated voluntary association,

Intervening Defendants-Appellees and Petitioner

MOTION OF CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON PETITION FOR REHEARING OF ORDER OF DISMISSAL

To the Honorable, The Chief Justice of the United States and The Associate Justices of the Supreme Court of the United States:

Now comes the Congress of Industrial Organizations and respectfully moves this Court pursuant to Rule 27, Paragraph 9 of the Rules of this Court, for leave to file a brief in this case as *amicus curiae* on the subject of and in support of the several petitions filed herein seeking rehearing and reconsideration of the order of dismissal.

The consent of the attorneys for Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, defendant and appellant, United DSR Employees Local 312 C.I.O., affiliated with Government Civic Employees Organizing Committee, C.I.O., intervening defendant and appellee, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., intervening defendant and appellee, to the filing of this brief has been obtained and is hereunto affixed.

The interest of the Congress of Industrial Organizations, petitioner, and its reasons for asking for leave to file a brief *amicus curiae* are set forth below:

The Congress of Industrial Organizations is a voluntary, unincorporated labor association, having affiliated with it a great number of international labor organizations which represent employees in almost every facet of American industry and enterprise. Its membership is in excess of six million workers. Among its constituent labor organizations is intervening defendant and appellee, Local 312, United DSR Employees, a labor organization representing public employees who are directly involved in the instant litigation and are directly affected by the terms of the Hutchinson Act, the subject at issue in the instant litigation.

The Congress of Industrial Organizations, further, is composed of other organizations also representing public employees directly affected by the Michigan Hutchinson Act and by other legislation in other states of a comparable nature.

Moreover the Congress of Industrial Organizations represents numerous other labor organizations including intervening defendant and appellee United Auto Workers, which, while they do not represent public employees, yet are vitally concerned by the implications of the decision of the Michigan Supreme Court upholding the Michigan legislation whose constitutionality is attacked in this litigation.

The Congress of Industrial Organizations is deeply and vitally affected as are its members with respect to the legislation whose constitutionality is here attacked and feels that the Michigan Supreme Court decision portends great and serious consequences for all labor organizations in the United States and their members.

Respectfully submitted,

ARTHUR J. GOLDBERG,
General Counsel for Petitioner, Congress of Industrial Organizations,
718 Jackson Place, N. W.,
Washington 6, D. C.

CONSENT TO FILING OF BRIEF AMICUS CURIAE BY CONGRESS OF INDUSTRIAL ORGANIZATIONS

Now come Division 26 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, defendant and appellant, United DSR Employees Local 312 C.I.O., intervening defendant and appellee, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., intervening defendant and appellee, through their respective counsel, and consent to the filing of a brief *amicus curiae* as above described, by the Congress of Industrial Organizations.

EDWARD N. BARNARD,
Attorney for Division 26, Defendant and Appellant.

RALPH R. GOLDSMITH,
Attorney for United DSR Employees, Local 312, Defendant and Appellee.

NICHOLAS J. ROTHE,
Attorney for International Union, UAW-CIO, Defendant and Appellee.

PROOF OF SERVICE

Alex Arene, being duly sworn, deposes and says that as an employee of Interstate Brief and Record Company, 642 Beaubien Street, Detroit 26, Michigan, he has charge of mailing and delivering briefs for use in the United States Supreme Court, that on October 23, 1952 he served two copies each of this petition to Hon. Paul T. Dwyer, 301 City Hall, Detroit, Michigan, Ralph Goldsmith, 1637 National Bank Building, Detroit, Michigan, Edward N. Barnard, 905 Dime Building, Detroit, Michigan and Nicholas Rothe, 3610 Cadillac Tower, Detroit, Michigan respectively, by serving same duly addressed to each of the parties.

He also served six copies upon Hon. Edmund E. Shepherd, Solicitor General of the State of Michigan by placing same in the United States Post Office at Detroit, Michigan, postage prepaid, duly addressed.

(Sgd.) Alex Arene.

Subscribed and sworn to before me this 23rd day of October, A. D. 1952.

(Sgd.) Bernice Mitten,

Notary Public, Wayne County, Michigan.
My commission expires September 23, 1956.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, et al.,
Appellants,

vs.

CITY OF DETROIT, ETC., et al.,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND TO NOTE JURISDICTION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the American Federation of Labor, by counsel, and respectfully moves this Court, pursuant to Rule 27, paragraph 9 of the Rules of this Court, for leave to file the accompanying brief amicus curiae in support of Appellants Petition for Rehearing of Order Dismissing Appeal and to Note Jurisdiction. Consent of the attorney for Appellant to the filing has been obtained. The consent of the attorney for respondent has not been obtained. The interest of the American Federation of Labor and the grounds supporting this motion are set forth below.

Many thousands of persons employed by public utilities of a proprietary nature are members of labor organizations affiliated with the American Federation of Labor. Many of

these members reside and work in the State of Michigan. Privately owned transportation companies employ some, while others work for municipally owned transportation utilities. All perform identical work in the same industry.

For generations, the American Federation of Labor has sought and achieved improved wages and working conditions for its members. The great social and economic gains were made at great cost and sacrifice. Preserving the basic rights, the vigorous exercise of which aided in securing the gains, constantly occupies the attention of the Movant. Among these rights is the right to be free from discriminatory legislation.

As a responsible organization actively engaged daily in protecting the rights of workers, the Movant desires to present its views in this case. Solely in the interest of protecting its members in Michigan, and all others similarly situated, from arbitrary legal and economic sanctions, the American Federation of Labor respectfully requests that this motion be granted.

Respectfully submitted,

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Counsel for
American Federation of Labor

Supreme Court of the United States

OCTOBER TERM, 1952

No. 207

DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, et al.,
Appellants,

vs.

CITY OF DETROIT, ETC., et al.,
Respondent.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND TO NOTE JURISDICTION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This brief is filed pursuant to Rule 27(9).

The American Federation of Labor respectfully requests that the Court rehear this matter and note jurisdiction.

REASONS FOR GRANTING REHEARING AND NOTING JURISDICTION

The points, authorities and arguments set forth by Appellants are concurred in by the American Federation of Labor. Special emphasis will be placed hereinafter on one of Appellants' grounds of appeal.

We contend that the Hutchinson Act patently violates the Federal Constitution. The Fourteenth Amendment provides:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law, *nor*

deny to any person within its jurisdiction the equal protection of the laws.''

(Emphasis supplied)

This Court has frequently interpreted the equal protection clause and applied it in a number of cases.

In *Barbier v. Connolly,* 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357, the Court stated at page 925:

> ''Equal protection and security should be given to all under like circumstances in the employment of their personal and civil rights . . . that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; *that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.''*
>
> (Emphasis supplied)

But the Hutchinson Act does just that. It imposes the ''capital punishment of industry'' by the summary forfeiture of job, emoluments, pension and retirement rights when a bus driver for a municipally owned transportation company goes on strike in Michigan. However, when a bus driver of a privately owned transportation company in Michigan goes on strike, the Act does not apply. The drivers perform the same duties in the same industry and the effect of a strike upon the public interest is the same in both cases. Yet, the Hutchinson Act imposes a burden on the striking municipally employed bus driver and not upon the privately employed bus driver in Michigan, though they are in the same ''calling'' and work under the same conditions. This is discrimination between persons in the same class.

And the discrimination is arbitrary—it is unreasonable. For the stated basis of distinction between the two groups of drivers in the same class, namely, that the one is a ''public employee'' while the other is a private employee—though true in fact, for constitutional purposes cannot be deemed a substantial distinction justifying the discrimination.

This Court stated in *Potsone v. Pennsylvania*, 232 U.S. 138, 58 L. Ed. 539, 34 S. Ct. 281 at Page 144:

> "A State may classify with reference to the evil to be prevented, and . . . if the class discriminated against is or reasonably might be considered to define those from whom the *evil is mainly to be feared*, it properly may be picked out."
>
> (Emphasis supplied)

The alleged evil the Hutchinson Act aims at is a strike involving a municipally owned transportation company. But it cannot seriously be argued that there is a greater tendency or likelihood for a strike to be called by municipally employed bus drivers than by privately employed bus drivers. The Legislature made no such finding or declaration in enacting the Act, and no such finding in truth could be made. The municipally employed bus driver in Michigan is no different type of individual than the privately employed bus driver. The provocation for a strike was not found by the Legislature to be greater in a municipally owned transportation company than in a private company. There is no genuine reasonable basis to impose a burden upon a bus driver working for a municipality and leave the privately employed bus driver free to exercise his economic rights without peril where the public interest is affected by a strike in the same manner and degree in both cases.

The fact that the stockholder in the one case may be a municipal corporation and in the other private individuals provides the only real basis of distinction. But this Court has never yet held that the mere identity of stockholders constitutes a reasonable basis justifying discriminatory legislation. For the identity of the owners of a profit making business is not even remotely connected with public health, safety, morals and welfare and these interests of society must be directly involved before a state may properly exercise its police power in a manner that imposes unequal restrictions on members of society. *Barbier v. Connolly, supra.*

Discrimination against members of a class by legislation "may be directed against a class when any fair ground for the discrimination exists." (*M.K.T. R.R. Co. v. May*, 194 U.S. 267, 48 L. Ed. 971, 24 S. Ct. 638, page 269.) It is respectfully contended that no fair ground for discrimination between municipally employed bus drivers and privately employed bus drivers was found by the Michigan legislature to justify the Hutchinson Act's application to the Appellants. Therefore, the Supreme Court of Michigan erred in holding the Hutchinson Act constitutional in its application to the Appellants and this Court should rehear the matter and note jurisdiction.

Respectfully submitted,

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JAMES A. GLENN,
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Counsel for
American Federation of Labor

No. 207. DIVISION 26 OF THE AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA ET AL. *v.* CITY OF DETROIT ET AL. Appeal from the Supreme Court of Michigan. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent. MR. JUSTICE BURTON is of the opinion that probable jurisdiction should be noted. *Edward N. Barnard* for appellants. *James H. Lee* for appellees. Reported below: 332 Mich. 237, 51 N. W. 2d 228.